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July 26, 2010

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: *In re 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*
MB Docket No. 09-182

Dear Ms. Dortch:

By and through their undersigned counsel, Fox Entertainment Group, Inc. and Fox Television Stations, Inc. (together, "Fox") hereby submit this brief response to the opening comments filed by Time Warner Cable Inc. ("TWC") and the American Cable Association ("ACA") as part of the record in the above-referenced proceeding.

Each of TWC and ACA attempts to use its comments in this proceeding to advocate for reform of the Commission's retransmission consent rules, notwithstanding that the FCC lacks statutory authority to prevent broadcasters from negotiating for fair compensation in exchange for granting multichannel video programming distributors ("MVPDs") the right to retransmit broadcast signals. TWC's and ACA's arguments, moreover, already have been thoroughly repudiated by a fulsome record, including comments submitted by Fox (and many others), in MB Docket No. 10-71. That record confirms both that the retransmission consent regime works precisely as Congress intended and that the FCC lacks jurisdiction to interfere with marketplace negotiations.

Equally important, the Commission should reject TWC's and ACA's attempts to bootstrap into this proceeding – which is designed to review the FCC's media ownership rules – the MVPDs' attack on retransmission consent. Given that the Commission already is reviewing the MVPDs' arguments in a separate forum – one initiated at the request of TWC and ACA – there is no reason for the FCC to duplicate the discussion here. In fact, it would contravene the public interest if the Commission were to permit its important analysis of media ownership issues to be sidetracked by the MVPDs' extrajudicial retransmission consent demands, especially in light of the urgent need for repeal of media ownership rules that inhibit competition, localism and diversity.

In any event, Fox is re-submitting for the record here its comments and reply comments in MB Docket No. 10-71 as well as its ex parte comments refuting allegations raised by TWC in connection with the retransmission consent dispute between Mediacom Communications Corp. and Sinclair Broadcast Group, Inc. Fox respectfully requests that, to the extent the Commission considers issues relating to retransmission consent as part of this proceeding, it incorporate the enclosed Fox comments into the record here.

Should you have any questions concerning this submission, kindly contact the undersigned.

Respectfully submitted,

Antoinette Cook Bush
Jared S. Sher
Counsel to Fox

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	MB Docket No. 10-71
Petition for Rulemaking to Amend	)	
the Commission's Rules Governing	)	
Retransmission Consent	)	

COMMENTS IN RESPONSE TO PETITION FOR RULEMAKING

OF

CBS CORPORATION
FOX ENTERTAINMENT GROUP, INC. AND FOX TELEVISION STATIONS, INC.
NBC UNIVERSAL, INC. AND NBC TELEMUNDO LICENSE CO.
THE WALT DISNEY COMPANY
UNIVISION COMMUNICATIONS INC.

Dated: May 18, 2010

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SUMMARY

The Broadcast Networks hereby respectfully submit their initial views in response to the Commission's public notice seeking comment about the petition for rulemaking filed by several multichannel video programming distributors ("MVPDs") and their supporters. In the *Petition*, the MVPDs ask the government to protect them against having to compete in a free marketplace. Even though they acknowledge that broadcasters provide some of the most popular and compelling content carried in their channel line-ups, the MVPDs seek to avoid a very simple marketplace reality – emerging competitive forces are now compelling them to pay fair market value for this programming, nearly 20 years after Congress expressly provided for such marketplace negotiations.

As a result, the Petitioners urge the FCC to engage in an extrajudicial reformation of the retransmission consent process. The *Petition*, however, provides neither a legal nor a policy basis for the Commission to cast aside rules that work as Congress intended. The Commission, of course, has no power to set aside Congress' explicit instructions. In Section 325(b) of the Communications Act, Congress specifically provided that "[n]o cable system or other [MVPD] shall retransmit the signal of a broadcast station . . . except . . . with the express authority of the originating station." This unambiguous statutory language leaves the Commission with no legal authority to interfere with the free market negotiations that take place as part of the retransmission consent regime.

Even as a matter of policy, there is no reason for the FCC to abandon its consistent conclusion that "local television broadcaster[s] and [MVPDs] negotiate in the context of a level playing field . . . ." Indeed, it is only because they face new competition that Petitioners apparently seek to avoid negotiating for compensation on fair terms and conditions. Perhaps

it goes without saying that the Petitioners would prefer to include broadcast stations in their channel line-ups without having to pay anything. The Commission, however, should reject the Petitioners' effort to mischaracterize competition as a threat from which MVPDs need government protection. Indeed, wholly apart from the quite remarkable assertion that highly-profitable MVPDs need "protection" from the fear of domination by broadcasters, the reality is that the *Petition* presents the Commission with no sound reason for intervening to "fix" a retransmission consent regime for which there is no evidence of anything broken, let alone evidence of consumer harm. Literally thousands of negotiations have been successfully concluded since 1992; it is only the exceptionally rare case in which a bargaining impasse has caused an MVPD to drop a broadcast station temporarily from the channel line-up. At the same time, broadcast stations and networks are confronting challenges to their own businesses, as competition in the video marketplace has given viewers access to vastly more choices for programming even as broadcasters' costs for marquee content also have been increasing.

Although the Commission lacks jurisdiction to interfere with free market retransmission consent negotiations, and to implement the Petitioners' improvident suggestions for reform, this does not mean that consumers are left powerless. During contentious negotiations, MVPDs suggest that viewers have no choices and risk being cut off from their favorite programming in the event of a retransmission consent bargaining impasse, but the modern marketplace offers consumers multiple alternative cable, satellite and telephone company video providers for obtaining their favorite broadcast programming in any given market, and they also can receive the programming over-the-air for free. The

Commission could explore ways to ensure that consumers have timely information about their right and ability to obtain desired programming from alternative sources.

In short, MVPDs do not need the government to tip the negotiating scales in their favor. Broadcast programming remains incredibly popular among consumers – and incredibly valuable to MVPDs, or else they simply would choose not to carry retransmission consent stations in their programming line-ups. Broadcasters invest enormous resources, and take immense financial risks, to create, produce and distribute this content. As Congress and the Commission have long recognized, MVPDs should pay fair compensation for this programming. Moreover, rigorous economic analyses have shown that the total cost for *all* MVPD content (of which broadcast retransmission consent is just a small fraction) is not a driving force behind retail rate increases.

Thus, no matter how hard they try to wrap themselves in the mantle of consumer welfare, the Petitioners, in reality, are simply seeking to avoid normal marketplace negotiations to arrive at a fair value for the right to carry the broadcast stations whose programming is far and away the most popular content they sell to their subscribers.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	MB Docket No. 10-71
Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent	)))	

COMMENTS OF THE BROADCAST NETWORKS

CBS Corporation, Fox Entertainment Group, Inc. and Fox Television Stations, Inc., NBC Universal, Inc. and NBC Telemundo License Co., The Walt Disney Company, and Univision Communications Inc. (collectively the "Broadcast Networks") hereby respectfully submit these initial views in response to the Commission's public notice seeking comment about the petition for rulemaking filed March 9, 2010 by several multichannel video programming distributors ("MVPDs") and their supporters (collectively, the "Petitioners").[1]

As demonstrated herein, the retransmission consent regime works, and flourishing competition has brought numerous benefits to broadcasters, MVPDs and consumers alike. Notwithstanding this competition, or more likely because of it, a handful of profitable cable, satellite and telephone company (telco) video providers have come forward to criticize a regulatory structure that in fact relies on fair and free market negotiations to ensure that broadcasters receive just compensation for their investments in creating and distributing what is indisputably some of the most compelling and popular programming on television. The Commission should reject the Petitioners' invitation to interfere with a

[1] *See In re Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71, DA 10-474 (filed Mar. 9, 2010) (the "*Petition*").

structure that not only works well, but which the FCC lacks authority to alter in the manner proposed by the *Petition*.

I. THE RETRANSMISSION CONSENT MARKETPLACE IS FUNCTIONING JUST AS CONGRESS ENVISIONED

A. As the FCC Consistently Has Concluded, Broadcasters and MVPDs Negotiate For Signal Carriage on an Even Playing Field

Section 325(b)(1) of the Communications Act, 47 U.S.C. § 325(b)(1), provides in pertinent part that "[n]o cable system or other [MVPD] shall retransmit the signal of a broadcasting station . . . except . . . with the express authority of the originating station." In passing this law, Congress emphasized that it intended "to establish a marketplace for the disposition of the rights to retransmit broadcast signals" but did not desire "to dictate the outcome of the ensuing marketplace negotiations."[2]

After nearly 20 years, the free market competition that Congress envisioned finally has come to fruition, as multiple competing MVPDs, including two Direct Broadcast Satellite providers (*e.g.*, DISH Network and DirecTV), cable over-builders and telco video providers (*e.g.*, Verizon FiOS and AT&T U-verse), vie for subscribers. Petitioners apparently are motivated by the fact that, as a result of free market negotiations, MVPDs may now find it necessary to pay monetary compensation to broadcasters, just as they do for the cable, satellite and telco video programming channels they distribute. Of course, it is the hallmark of a free market that a party may choose when and whether to enter into commercial relationships with other parties, to raise or lower its prices as governed by market conditions, and to walk away from a deal if it cannot reach agreement with its counterparty on mutually acceptable terms and

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[2] S. Rep. 102-92 (1991), at 36.

conditions. This free market is just what Congress had in mind when it enacted Section 325.[3] It is the economic tension resulting from a more competitive video programming marketplace, however – and not any flaw in the retransmission consent regime – that has motivated MVPDs to reconsider their negotiating tactics.

Petitioners claim that reform of the retransmission consent process is required to somehow "fix" the video programming marketplace.[4] Contrary to the rhetoric in the *Petition*, the Petitioners' proposed reforms would not promote a free market for retransmission consent; they would destroy it. Indeed, the *Petition* would subvert the retransmission consent process by stripping away from broadcasters the only bargaining power they have in a negotiation: the twin rights to negotiate for fair compensation and to refuse consent to an MVPD's carriage in the absence of fair compensation – rights available to all other video programming networks.

At its core, the *Petition* asks the Commission to repeal the essential right that Congress granted to broadcasters in Section 325 of the Act. The FCC, of course, has no authority to set aside rights bestowed by Congress. Equally significant, the Commission itself consistently has found that the retransmission consent regime is working as Congress intended. In particular, less than five years ago, the Commission issued a report to Congress in which it decided "not . . . to recommend any changes to the

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[3] *See, e.g., id.* at 35 ("Cable operators pay for the cable programming services they offer to their customers . . . [and] programming services which originate on a broadcast channel should not be treated differently.").

[4] *Petition*, at 35.

retransmission consent regime . . . ."[5] The Commission noted that the retransmission consent process provides "incentives for both parties to come to mutually beneficial arrangements."[6] Moreover, the FCC has observed that both broadcasters and MVPDs:

> benefit when carriage is arranged – the station benefits from carriage because its programming and advertising will be carried as part of the MVPD's service, and the MVPD benefits because the station's programming makes the MVPD's offerings more appealing to consumers. Most importantly, consumers benefit by having access to such programming via an MVPD.[7]

Ultimately, the Commission reported to Congress that "local television broadcaster[s] and [MVPDs] negotiate in the context of a level playing field in which the failure to resolve local broadcast carriage disputes through the retransmission consent process potentially is detrimental to each side."[8] All the hype surrounding retransmission consent notwithstanding, the fact is that advertising remains the economic engine of broadcast television, and without distribution to the widest possible audience (including MVPD subscribers), the advertising engine would sputter to a halt. For these reasons, it should come as no surprise that literally thousands of retransmission consent negotiations have been concluded successfully since 1992, while bargaining impasses have caused MVPDs to drop broadcast stations only in exceptionally rare instances, and even then, only for brief periods of time.[9] In short, nothing has changed since the 2005 report. The

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5 Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, ¶ 35 (Sept. 8, 2005), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260936A1.pdf.

6 *Id.* at ¶ 44 (internal citation omitted).

7 *Id.*

8 *Id.*

9 *See* Letter from Erin L. Dozier, Associate General Counsel, Legal and Regulatory Affairs, National Association of Broadcasters, to Marlene H. Dortch, Secretary, FCC (dated May 6, 2010),

FCC has never found – nor could it – that there is an imbalance in bargaining between MVPDs and broadcasters.

B. Notice and Disclosure Could Protect Consumers Against Manufactured Crises

Although the Commission lacks jurisdiction to interfere with free market retransmission consent negotiations, and to implement the Petitioners' improvident suggestions for reform, this does not mean that consumers are left powerless. In contentious negotiations, MVPDs suggest that viewers have no choices and risk being cut off from their favorite programming in the event of a retransmission consent bargaining impasse, but the modern marketplace offers consumers multiple alternative cable, satellite and telco video providers for obtaining their favorite broadcast programming in any given market, and they also can receive the programming over-the-air. The Commission could explore ways to ensure that consumers have timely information about their right and ability to obtain desired programming from alternative sources.

At the end of the day, a private negotiation between a broadcaster and an MVPD need not put consumers in a position where they are at risk of losing channels at the last minute. Consumers have the right, and should have the opportunity, to take advantage of the many alternative choices available when one MVPD's behavior threatens the potential loss of popular content. Other than exploring ways to provide consumers with adequate information, however, there is no reason for the Commission to abandon its

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Attachment A, *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon*, Jeffrey A. Eisenach and Kevin W. Caves, Navigant Economics ("*Eisenach Report*"), at 18-19 (analysis of all retransmission negotiation impasses from 2006 through April 2010 shows that consumers are more than *20 times* more likely to be deprived of television viewing by an electricity outage than by a bargaining impasse between broadcasters and MVPDs and aggregate service interruptions from retransmission consent negotiating impasses "represent approximately *one one-hundredth of one percent* of annual U.S. television viewing hours") (emphasis supplied).

sound conclusion that the retransmission consent regime is functioning as Congress intended.

II. CONGRESS DIRECTED THE COMMISSION TO RELY ON THE MARKETPLACE FOR RESOLUTION OF RETRANSMISSION CONSENT NEGOTIATIONS

Congress passed Section 325 of the Communications Act "to establish a marketplace for the disposition of the rights to retransmit broadcast signals . . . ."[10] In doing so, it expressed "the policy of the Congress in this Act to . . . rely on the marketplace, to the maximum extent feasible, to achieve" the "availability to the public of a diversity of views and information through cable television and other video distribution media."[11] Congress concluded that "a very substantial portion of the fees which consumers pay to cable systems is attributable to the value they receive from watching broadcast signals" and public policy should not support a system "under which broadcasters in effect subsidize the establishment of their chief competitors."[12] Thus, the legislative history emphasized that "it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations."[13] The Commission always should be cautious about dictating the outcome of marketplace negotiations, but it should be especially wary of interfering with marketplace rights that have been bestowed explicitly by Congress.

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[10] S. Rep. No. 102-92, at 36.

[11] H. Rep. No. 102-862 (1992), at 4.

[12] S. Rep. No. 102-92, at 35.

[13] *Id.* at 36.

A. The Commission Lacks Jurisdiction to Interfere With Free Market Negotiations Through Temporary Standstills, Interim Carriage Obligations or Mandatory Arbitration

By its plain terms, with respect to stations that elect retransmission consent, Section 325 of the Act precludes any cable system or other MVPD from "retransmit[ing] the signal of a broadcasting station . . . except . . . with the express authority of the originating station."[14] There is no ambiguity in this statute, and the Commission has no room to maneuver around its plain meaning to adopt rules that permit MVPD carriage of a broadcast station without the station's consent.[15] The Petitioners' argument that the Commission has jurisdiction to impose carriage mandates or binding arbitration therefore is entirely without merit.

The MVPDs cite to Section 325(b)(3)(A) of the Act,[16] but that provision merely directed the FCC to adopt rules implementing the statute within 180 days of enactment of the Cable Act. Even if the FCC were to conclude that Section 325(b)(3)(A) provides it with some type of enduring authority, the statutory provision required the FCC to "consider the impact that the grant of retransmission consent . . . may have on the *rates* for the basic service tier" charged to consumers.[17] The Commission could not rationally take action under this statute to ensure that *consumers* have access to reasonable *retail rates* unless it were to undertake an examination of *every single* component of basic tier charges. That would only lead down the road of intrusive cable rate re-regulation, which

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[14] 47 U.S.C. § 325(b)(1).

[15] *See Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (if a statute "has directly spoken to the precise question at issue," the agency "must give effect to the unambiguously expressed intent of Congress").

[16] *See Petition*, at 38.

[17] *See* 47 U.S.C. § 325(b)(3)(A).

would entail the FCC's flyspecking not only retransmission consent but other aspects of the basic tier, including prices charged to consumers for installation and the rental and/or purchase of MVPD equipment – an unpalatable outcome in an environment of abundant and effective competition. We doubt that Petitioners seek such a result.

In any event, Petitioners' reliance on Section 325(b)(3)(A) as a hook for authority to impose standstill or arbitration requirements is misplaced. First, the provision does not authorize the Commission to ignore the explicit prohibition on an MVPD's carriage of any broadcast signal without the originating station's "express" consent, as set forth in Section 325(b)(1)(A). Second, simply as an empirical matter, Petitioners vastly overstate the purported relationship between retransmission consent compensation and retail cable rates.

A number of rigorous economic analyses have shown that the retransmission consent process benefits consumers and that the total cost for *all* cable content (of which broadcast retransmission consent is itself just a small fraction) comprises just a small portion of retail rates and is not a driving force behind rate increases.[18] As Dr. Jeffrey Eisenach recently explained to the Commission, "the data simply do not support the claim that increases in MVPD rates are caused by rising programming costs in general, or

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[18] *See Eisenach Report*; *see also, e.g.,* Letter from Susan L. Fox, Vice President, Government Relations, The Walt Disney Company, to Marlene H. Dortch, Secretary, FCC (dated May 5, 2010), at Attachment, *Video Programming Costs and Cable TV Prices*, Jeffrey A. Eisenach (Apr. 2010); *Wholesale Packaging of Video Programming*, Bruce M. Owen (Jan. 4, 2008) (submitted as part of MB Docket No. 07-198); *Retransmission Consent and Cable Television Prices*, Jeffrey A. Eisenach and Douglas A. Trueheart, Cap Analysis (Mar. 31, 2005) (submitted as part of MB Docket No. 05-28); *Response to Comments Regarding Economic Consequences of Retransmission Consent*, Michael G. Baumann and Kent W. Mikkelsen, Economists Incorporated (Mar. 31, 2005) (submitted as part of MB Docket No. 05-28); *Affiliate Clearances, Retransmission Agreements, Bargaining Power and the Media Ownership Rules*, Bruce M. Owen, Michael G. Baumann and Kent W. Mikkelsen, Economists Incorporated (Apr. 21, 2003) (submitted as part of MB Docket No. 02-277).

rising retransmission fees in particular."[19] In fact, "[t]o the contrary, programming costs are rising slower than MVPD revenues, slower than other components of MVPD costs, and slower than MVPD profits . . . ."[20] Moreover, "retransmission fees make up a small fraction of programming costs, and an even smaller percentage of MVPD revenues."[21] In particular, Dr. Eisenach found that, with respect to six major cable operators, for each dollar of increase in programming expenses between 2003 and 2008, cable operators raised total charges by nearly $4.[22] Thus, "while rates for certain types of MVPD services – such as cable television prices – are undeniably on the rise, it makes little sense to blame this trend on programming costs, and even less to single out retransmission fees."[23]

The Petitioners' citations to various categories of the FCC's ancillary authority are equally unavailing.[24] As the D.C. Circuit recently made abundantly clear, the Commission's ability to rely on ancillary authority is limited; it can invoke ancillary jurisdiction only to take an action reasonably linked to an express grant of statutory authority.[25] Furthermore, as the *Petition* itself acknowledges,[26] Sections 4(i) and 303(r) of

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19 *Eisenach Report*, at 21.

20 *Id.*

21 *Id.*

22 *See id.* at 22.

23 *Id.*

24 *See Petition*, at 38-39.

25 *See Comcast Corp. v. FCC*, 600 F. 3d 642, 653 (2010) ("ancillary authority is really incidental to, and contingent upon, *specifically delegated powers under the Act*") (internal citation omitted) (emphasis in original); *see also id.* at 661 (reversing the Commission for attempting to exercise an "expansive theory of ancillary authority").

26 *See Petition*, at 38.

the Act permit ancillary regulation only when a Commission action would not be "inconsistent" with the Act.[27] Quite clearly, neither a mandatory standstill nor binding arbitration can be considered reasonably ancillary to any express provision in the Act. More important, both of the Petitioners' proposals – which contemplate MVPD carriage of broadcast signals without an originating station's consent, or on terms and conditions to which the originating station has not agreed – would directly contravene Section 325(b)(1) of the Act.

The terms of Section 325(b)(1) place broadcast content in a fundamentally different legal position than subscription channels, for which the Commission recently adopted standstill/interim carriage rules on the basis of ancillary authority.[28] As part of the *Program Access Order*, the FCC found that no express statutory guidance conflicted with its use of ancillary authority. Quite clearly, that is not the case when it comes to retransmission consent for broadcast signals. Incidentally, cable operators opposed the Commission's use of ancillary jurisdiction in the *Program Access* proceeding when their own channels were exposed to a standstill requirement, yet they apparently have no compunction in asserting the exact opposite position here. Having previously argued to the Commission that there is no policy or legal basis for the imposition of a standstill obligation in connection with program access disputes, cable operators should not be heard to endorse a standstill requirement for broadcast programming.

In short, the Commission has no jurisdiction to adopt the reforms proposed in the *Petition*, and Petitioners have offered no persuasive evidence to the contrary. Section

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27 *See* 47 U.S.C. §§ 154(i), 303(r).

28 *See In re Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd 746 (2010) (the "*Program Access Order*").

325 of the Act unambiguously prohibits MVPDs from carrying a broadcast signal without the originating station's consent. The statute precludes the proposed standstill obligation, which would permit an MVPD to retransmit a broadcast signal even in the absence of a retransmission consent agreement, just as much as it bars compulsory arbitration, which would substitute an arbitrator's dictates for the outcome of the private negotiations envisioned by Congress.[29] In either case, the Petitioners are asking that an MVPD be permitted to carry a broadcast signal without the station's consent – relief that the Commission cannot lawfully provide.

B. Broadcasters Have a First Amendment Right to Determine the Manner in Which They Distribute Their Programming

Putting aside the FCC's lack of jurisdiction to implement the Petitioners' proposed overhaul of retransmission consent, the imposition of a temporary standstill or interim carriage obligation also would violate broadcasters' First Amendment rights. As the Supreme Court has made clear, video programming networks "engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."[30] All video programming channels, just like newspapers or magazines, have First Amendment rights to speak and to distribute their content as they see fit.[31] Any FCC decision that interferes with broadcasters' right to control their speech

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[29] To be clear, the MVPDs' request for arbitration involves far more than determining a fair market price for broadcast programming; retransmission consent negotiations also typically address such sensitive business issues as video-on-demand content, channel positioning and carriage of multicast streams, among other things.

[30] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994).

[31] *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790-91 (1988) ("The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it."); *see also Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (subjecting regulation of loudspeaker volume to First Amendment review).

would be subject to heightened constitutional scrutiny. Given the abundance of competition in the video programming marketplace, the Commission could not possibly justify a regulation of speech as narrowly tailored in furtherance of an important governmental objective.[32]

A regulation that compels programmers to speak when they would choose otherwise poses a First Amendment issue because "[t]hat kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster. For corporations as for individuals, the choice to speak includes within it the choice of what not to say."[33] Indeed, the right of a First Amendment-protected speaker not to speak "serves the same ultimate end as freedom of speech in its affirmative aspect."[34] There is no basis for treating broadcasters in a disparate manner from any other video programming network in the context of the right to choose whether and how to speak.

Furthermore, in a recent case before the D.C. Circuit, MVPDs themselves argued that a ban on exclusive contracts violated their First Amendment rights by compelling them to speak against their will.[35] Now, when it is broadcast content at stake, the MVPDs' own articulation of First Amendment principles should govern here as well.

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32 *See United States v. O'Brien*, 391 U.S. 367, 377 (1968).

33 *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986) (internal citations omitted); s*ee also Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876 (2010).

34 *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (internal citation omitted).

35 *See Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1311-12, 1316-19 (D.C. Cir. 2010).

III. MVPDS BENEFIT TREMENDOUSLY FROM BROADCASTERS' INVESTMENTS IN COMPELLING CONTENT AND SHOULD NOT BE PERMITTED TO USE THE FCC TO GAIN LEVERAGE TO AVOID NEGOTIATING FOR FAIR COMPENSATION

A. The FCC Should Not Entertain Operators' Complaints About Having to Pay Fair Market Value for the Most Popular Programming Carried on Their Systems

Petitioners' arguments are self-contradictory. On the one hand, the MVPDs ask for government intervention because they claim that broadcast programming is so important to their channel line-ups that they would suffer competitive harm without it. On the other hand, the entire *Petition* is motivated by the MVPDs' reluctance at the bargaining table to pay fair market compensation for this valuable content. The Commission should not permit the MVPDs to have it both ways – either broadcast content really is valuable programming, in which case it deserves just compensation, or, if they feel retransmission consent stations are unworthy of fair payment, MVPDs should elect not to carry them. Of course, MVPDs ascribe great value to broadcast programming precisely because their own subscribers want access via the MVPD channel line-up to some of the most popular programming on television. Indeed, because broadcast programming remains incredibly popular among consumers, MVPDs reap tremendous benefits by carrying broadcast stations on their systems.[36]

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[36] The cable industry was founded as a business designed to make popular broadcast programming more accessible to consumers. DirecTV and DISH Network fought for years to gain the right to distribute local broadcast signals. Local-into-local was their number one priority for a reason – they knew that access to popular broadcast content was essential to their ability to compete. The Commission, for example, found that "significant increase[s]" in DBS subscribership can be attributed to the "authority granted to DBS providers . . . to offer 'local-into-local' service." *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd 6005, 6038 (2001) (citing study finding a 43 percent increase in new subscriber additions for DBS providers in markets where they began to retransmit local broadcast signals).

Moreover, cable, satellite and telco video distributors are highly profitable enterprises. Time Warner Cable just reported that its most recent quarterly earnings increased 30 percent on revenues of $4.6 billion.[37] DirecTV, meanwhile, saw its quarterly revenues soar to $5.6 billion, which generated more than $500 million in net income.[38] Cablevision reported a tripling of its quarterly profit, with revenue of nearly $2 billion and $240 million in free cash flow.[39] And Insight detailed that its revenues jumped by 10 percent in the most recent quarter, compared to the prior year, generating $40 million in free cash flow.[40]

These examples reveal that MVPDs are healthy businesses; they appear motivated to seek the aid of government here so as to avoid having to share those profits equitably with the very creators of the content that has helped make MVPDs so successful. It is a fundamental tenet of a competitive marketplace, however, that as costs rise, profit margins may shrink. This is certainly true of broadcast stations and networks, which like all businesses have had to deal with the impact to their bottom lines as competition in the video marketplace has given viewers access to vastly more choices for programming, even as broadcasters' costs for marquee programming also have been increasing. Petitioners present no basis whatsoever to support their position that MVPDs should be

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37 *See* D. Yao, *Time Warner Cable first-quarter profit rises, shares climb*, THE OAKLAND PRESS, Apr. 29, 2010, http://www.theoaklandpress.com/articles/2010/04/29/business/doc4bd9db906b65d-507224758.txt.

38 *See* K. Riddell, *DirecTV Profit Beasts Estimates on Premium Services (Update2)*, BLOOMBERG BUSINESSWEEK, May 6, 2010, http://www.businessweek.com/news/2010-05-06/directv-profit-beats-estimates-on-premium-services-update2-.html.

39 N. Worden & D. Benoit, *Cablevision Profit More Than Triples*, THE WALL STREET JOURNAL, May 6, 2010, http://online.wsj.com/article/SB10001424052748704370704575228052-080463886.html.

40 Business Wire, *Insight Announces First Quarter 2010 Results*, May 10, 2010, Yahoo! Finance, http://finance.yahoo.com/news/Insight-Announces-First-bw-2937754880.html?x=0&.v=1.

insulated from normal market forces. The fact that competition has emerged to the point where MVPDs have to compete for consumers on pricing should be a testament to Congress' vision for a competitive marketplace, not a criticism of retransmission consent.

B. Carriage Negotiations Foster Competition and Generate Benefits for Consumers, Broadcasters and MVPDs Alike

While the Petitioners have attempted to portray themselves as acting under the auspices of the public interest, the stark reality is that the future of over-the-air television depends on the broadcast business model developing a second stream of revenue. Thus, the true public interest lies in preserving the marketplace that Congress created to ensure the future viability of free broadcast television. Broadcasting traditionally has been a medium supported solely by advertising, while cable, satellite and telco video networks receive revenue from both advertising and per-subscriber license fees. If free, over-the-air television is to remain the home of compelling programming, broadcasters must be allowed to seek marketplace payments for their programming as they seek to remain competitive.

There is ample economic evidence that consumers are the real beneficiaries of the market forces that Congress wisely unleashed. For example, as Economists Inc. has explained, the "opportunity to be compensated for retransmission consent should increase [broadcasters'] incentives to provide attractive programming."[41] These increased incentives are manifested in the improved quality of local programming that a broadcast

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[41] *See Response to Comments Regarding Economic Consequences of Retransmission Consent*, Michael G. Baumann and Kent W. Mikkelsen, Economists Incorporated (Mar. 31, 2005) (submitted as part of MB Docket No. 05-28), at 12.

station can produce as well as the higher quality national programming that a station can acquire. Consumers, as a result, receive better and more appealing content.

In addition, contrary to the Petitioners' claim that broadcast stations exercise "market power" in retransmission consent negotiations, expert economic analyses have confirmed that the mere fact broadcasters distribute high-quality programming does not give them undue leverage (especially given the *hundreds* of channels of non-broadcast programming that MVPDs carry).[42] As Dr. Eisenach explained, "the first thing economists look for in judging prices is existence of market power or other forms of market failure."[43] Given that "there is virtually no evidence of market power on behalf of programmers," Dr. Eisenach concluded that "cable operators' claims that programming prices are 'too high' do not square with the underlying structure of the marketplace."[44]

Another way to examine pricing questions is to review the role that MVPDs' programming expenses have played over time and compare these costs with operators' other costs and their profits. Put simply, Dr. Eisenach found cable operators' claims of harm "unjustified," since programming costs "are not rising relative to cable operators' revenues, profits or other costs."[45] As noted above, total cable operator revenues are increasing at a much faster pace than programming costs, and so, in turn, are cable profits.[46] In other words, relative to the pertinent financial metrics, cable operators' costs

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42 *See, e.g.*, Letter from Susan L. Fox, Vice President, Government Relations, The Walt Disney Company, to Marlene H. Dortch, Secretary, FCC (dated May 5, 2010), Attachment, *Video Programming Costs and Cable TV Prices*, Jeffrey A. Eisenach (Apr. 2010), at 3.

43 *Id.*

44 *Id.*

45 *Id.* at 4.

46 *See supra*, Section II.A.

attributable to programming are actually *declining*. And because costs attributable to retransmission consent constitute just a fraction of overall programming costs, it is simply illogical for Petitioners to posit that retransmission consent compensation plays any meaningful role in rising retail rates.

Indeed, if broadcasters had "market power," it would not have taken nearly 20 years to begin to achieve even a small measure of fair compensation; in fact, however, MVPDs refused for years to pay anything for the right to retransmit broadcast stations. Just because they are facing increased competition, and having to bargain on more equitable terms, does not mean that MVPDs deserve government protection from having to negotiate in the free market that Congress established.

IV. CONCLUSION

In sum, the retransmission consent marketplace is functioning well, just as Congress intended, and there is no basis in law or policy for the regulatory intervention that Petitioners seek. The Commission promptly should dismiss the *Petition* and terminate this proceeding.

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Dated: May 18, 2010

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	MB Docket No. 10-71
Petition for Rulemaking to Amend	)	
the Commission's Rules Governing	)	
Retransmission Consent	)	

REPLY COMMENTS

OF

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June 3, 2010

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Before the
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Washington, D.C. 20554

In the Matter of	)	
	)	MB Docket No. 10-71
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REPLY COMMENTS OF
FOX ENTERTAINMENT GROUP, INC. AND FOX TELEVISION STATIONS, INC.

Fox Entertainment Group, Inc. and Fox Television Stations, Inc. (collectively, "Fox") hereby respectfully submit these reply comments in response to the Commission's public notice seeking feedback about the petition for rulemaking filed March 9, 2010 by several multichannel video programming distributors ("MVPDs") and their supporters (collectively, the "Petitioners").[1]

I. INTRODUCTION AND SUMMARY

The opening comments submitted in response to the *Petition* not surprisingly reveal a philosophical split between broadcasters, who seek reasonable and just compensation for the incredibly valuable programming that they distribute, and MVPDs, who lament the notion that emerging competitive forces are compelling them to pay fair market value for local station signals. What this dichotomy should reveal to the Commission is that private businesses have a market-based disagreement about the division of economic value – but that is precisely the type

[1] *See In re Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71, DA 10-474 (filed Mar. 9, 2010) (the "*Petition*").

of private business dispute in which the Commission historically and consistently has refused to intercede.[2]

That it lacks jurisdiction to dictate the outcome of free market retransmission consent bargaining is all the more reason for the FCC to steer clear of interference. Indeed, no commenter has presented the Commission with a sufficient legal basis for acceding to the Petitioners' requests for temporary standstills or mandatory arbitration. Nor has any commenter supplied any policy basis to justify the Commission abandoning its long-held belief that private business disputes are best resolved by the parties or, where appropriate, the courts. To the extent that the FCC has any concerns that these business disputes could impact viewers, numerous commenters have suggested ways that the Commission can focus on transparency and notice concepts to protect consumers.[3] For all of these reasons, the FCC promptly should dismiss the *Petition* and confirm that the retransmission consent regime established by Congress continues to provide important benefits to consumers, broadcasters and MVPDs alike.

In these reply comments, Fox responds specifically to opening comments that: (i) seek to divert the FCC's attention from MVPD bargaining tactics by focusing on the network-affiliate relationship; (ii) ignore Congress' clear endorsement of program bundling and claim that consumers are harmed by purportedly unlawful "tying" of broadcast stations and pay channels; and (iii) posit that the FCC has authority to mandate MVPD carriage of a broadcast station in the

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2 *See In re Monroe, Georgia Water Light and Gas Commission D/B/A Monroe Utilities Network v. Morris Network, Inc.*, 19 FCC Rcd 13977, 13981 (2004) ("*Monroe*") (the FCC has stressed that it will not "interject" itself into a private contractual dispute, which should be resolved by the parties or a court of competent jurisdiction).

3 *See, e.g.*, Comments of Belo Corp., at 10 ("Belo Comments"); Comments of The National Association of Broadcasters, *et al.*, at 62 ("NAB Comments"); Comments of Lin Television Corp., at 12 ("Lin Comments"); Comments of Local Broadcasters Coalition, at 12 ("Coalition Comments"); Comments of Sinclair Broadcast Group, Inc., at 10 ("Sinclair Comments") (all filed May 18, 2010 as part of MB Docket No. 10-71).

absence of the station's express consent, in direct contravention of the Communications Act (the "Act").

II. FOX'S NETWORK-AFFILIATION AGREEMENTS AND PRACTICES ARE FULLY CONSISTENT WITH THE COMMISSION'S RETRANSMISSION CONSENT RULES AND POLICIES

A. FCC Precedent Makes Clear That Congress Never Intended to Restrict Network-Affiliate Bargaining or Preclude Agreements That Affect Affiliates' Rights to Redistribute Network Programming

Although the Petitioners include an array of sophisticated business parties, which collectively have more than 61 million cable, direct broadcast satellite and telephone company (telco) video programming subscribers, they nonetheless beseech the government to protect them from having to negotiate with broadcasters in a free market. At base, the *Petition* constitutes little more than a thinly-veiled attempt to use the government to shield MVPDs from paying fair compensation for the most popular programming offered in the MVPD line-up. The Commission, however, should not permit its processes to be used to advance the Petitioners' economic self-interest.

The Petitioners attempt to distract the Commission from MVPDs' refusal to pay broadcasters fair compensation by focusing on the relationship between broadcast networks and their affiliate station partners. Thus, the *Petition* asserts that network "interference" in retransmission consent negotiations causes "harms to consumers,"[4] and Time Warner Cable's

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[4] *Petition*, at 24.

comments refer to networks' so-called "aggressive demands" for "dramatic increases" in compensation.[5]

Notwithstanding this colorful verbiage, the MVPDs cite no authority for their misplaced assertion that network-affiliate agreements somehow warrant "reform" of the retransmission consent system.[6] Nor could they, given that FCC precedent makes abundantly clear that contractual arrangements between networks and affiliates do not interfere with broadcasters' ability to negotiate in good faith with MVPDs for retransmission consent. As more fully described below, networks and affiliates sometimes agree that networks should be compensated as part of the exchange of consideration attendant to the network supplying the affiliate with popular (and expensive) national programming. Provisions in network-affiliation agreements that reflect the parties' agreement are fully consistent with FCC precedent, and no commenter here has shown otherwise.

In fact, the Commission specifically has recognized that "neither the text nor the legislative history" of the Act "indicate[s] a congressional intent to restrict the rights of networks and their affiliates through the good faith or reciprocal bargaining obligation to agree to limit an affiliate's right to redistribute affiliated programming."[7] Section 76.65 of the FCC's rules was "not intend[ed] to affect the ability of a network affiliate agreement to limit redistribution of

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5 Comments of Time Warner Cable, Inc., MB Docket No. 10-71 (filed May 18, 2010), at 8 ("Time Warner Cable Comments"). Likewise, Cablevision posits that networks "force[ ]" affiliates to "turn over" retransmission consent compensation to "enrich" the networks. Comments of Cablevision Systems Corp., MB Docket No. 10-71 (filed May 18, 2010), at 9 ("Cablevision Comments"). And the U.S. Telecom Association claims that networks have "commandeered" affiliates' retransmission consent negotiations. Comments of United States Telecom Association, MB Docket No. 10-71 (filed May 18, 2010), at 10.

6 *Petition*, at 21.

7 *In re Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004: Reciprocal Bargaining Obligation*, 20 FCC Rcd 10339, 10354 (2005) ("*Reciprocal Bargaining Order*").

network programming."[8] Furthermore, the FCC said that it "perceive[d] no intent on the part of Congress that the reciprocal bargaining obligation interfere with the network-affiliate relationship or . . . preclude specific terms contained in network-affiliate agreements . . . ."[9] The Commission also has emphasized consistently that the mere "existence of an underlying agreement" between a network and an affiliate "is [not] a violation of the good faith negotiation requirement," since the obligation "applies to negotiations between MVPDs and broadcast stations, and not between a network and an affiliate."[10]

In resolving good faith bargaining disputes, the FCC explicitly has found that broadcast stations are permitted to enter into, and honor, network-affiliation agreements that contain provisions restricting a station's right to grant retransmission consent to an MVPD.[11] Most recently, the Commission held just last year that a station was well within its authority to break off bargaining with an MVPD when it discovered, after initially engaging in negotiations, that it was precluded by the terms of its network-affiliation agreement from granting consent to the MVPD in question.[12] The FCC "decline[d] to find that [the station's] conduct" in ceasing negotiations "violated the Commission's good faith standards."[13] In particular, the FCC said that a "negotiation[ ] for which a broadcaster is contractually precluded from reaching consent may be truncated . . . ."[14]

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8 *Id.* at 10355.

9 *Id.* at 10354.

10 *Monroe*, 19 FCC Rcd at 13980, n. 24.

11 *See, e.g.*, *In re ATC Broadband LLC and Dixie Cable TV, Inc. v. Gray Television, Inc.*, 24 FCC Rcd 1645, 1648-49 (2009) ("*ATC Broadband*"); *Monroe*, 19 FCC Rcd at 13980, n. 24.

12 *See ATC Broadband*, 24 FCC Rcd at 1645.

13 *Id.* at 1649.

14 *Id.* (*citing Reciprocal Bargaining Order*, 20 FCC Rcd at 10345).

In addition, just two years ago the Commission completed its years-long, detailed inquiry into the network-affiliate relationship.[15] The proceeding stemmed from a "Petition for Inquiry into Network Practices" filed by the Network Affiliated Stations Alliance ("NASA"), which sought a full-fledged Commission investigation of numerous provisions in network-affiliation agreements that NASA alleged violated FCC rules and policies. Notably, NASA did not once complain about the interplay between the network-affiliate relationship and retransmission consent. After years of intensive examination, the FCC ultimately issued a "Declaratory Ruling" terminating the proceeding.[16] Notwithstanding the close scrutiny given all network-affiliation contracts, including Fox's, the Commission did not raise any concern about the impact that the network-affiliate relationship might have on retransmission consent.

Put simply, the retransmission consent statute and the FCC's rules recognize that broadcast stations and networks have a right to freely negotiate between themselves about how to fairly divide their shared basket of rights and responsibilities.[17] The Commission should disregard the *Petition*'s fixation with the network-affiliate relationship and reject the MVPDs' efforts to shift the focus of discussion away from their own bargaining tactics.

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15 *See Network Affiliated Stations Alliance Petition for Inquiry into Network Practices and Motion for Declaratory Ruling*, 23 FCC Rcd 13610 (2008).

16 *See id.*

17 Several commenters pointed out that while Congress did not permit the FCC to play any role in the *outcome* of retransmission consent negotiation, the Commission can play a limited role in overseeing the negotiating process – namely by ensuring that both sides bargain in good faith. *See, e.g.*, Comments of Gray Television, Inc., MB Docket No. 10-71 (filed May 18, 2010), at 4 ("Gray Television Comments"). Having found repeatedly that network-affiliation agreements do not impact good faith bargaining between stations and MVPDs, there is neither a need nor a basis for the Commission to further scrutinize the network-affiliate relationship in connection with retransmission consent.

B. Networks Advance Legitimate Public Interest Goals When They Seek to Be Compensated for the High Quality Programming That They Distribute

With no apparent regard for the Commission's unambiguous precedent, a handful of commenters also suggest that network "demands" are at odds with congressional intent and the public interest because they permit an entity other than a single local station to benefit from retransmission consent.[18] Time Warner Cable, for instance, points to the legislative history of the retransmission consent statute for the proposition that "local stations, not national networks" should have the right to control the use of their signals.[19] These arguments cannot withstand scrutiny.

First and foremost, as Fox explained to the FCC in detail in December 2009, the provisions contained in its network-affiliation agreements *do not* grant Fox any ability to usurp its affiliates' control over their broadcast signals.[20] In fact, Commission precedent makes clear that once a station grants retransmission consent to an MVPD, the MVPD has the right under the Act to carry that station's entire signal – even if the text of the station's affiliation agreement purports to restrict it from granting consent.[21] Accordingly, local stations necessarily maintain control over their signals.

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[18] *See* Time Warner Cable Comments, at 8; Cablevision Comments, at 10; Comments of The American Public Power Association, *et al.*, MB Docket No. 10-71 (filed May 18, 2010), at 6 ("APPA Comments"); Comments of Bright House Networks, Inc., MB Docket No. 10-71 (filed May 18, 2010), at 13; Comments of Free Market Operators, MB Docket No. 10-71 (filed May 18, 2010), at 5.

[19] Time Warner Cable Comments, at 8.

[20] *See In re Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, Ex Parte Comments of Fox Broadcasting Company in Response to Time Warner Cable's Comments, CSR Nos. 8233-C and 8234-M (filed Dec. 17, 2009).

[21] *See Monroe*, 19 FCC Rcd at 13980; *see also In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 3005 (1993) (the "*1993 Order*") ("[B]roadcasters cannot bargain over retransmission consent rights to individual programs carried via broadcast signals. Any bargaining must be for retransmission consent rights to the entire signal.").

Second, contrary to the MVPDs' conclusory assertions, networks' legitimate desire to receive compensation for the programming that they distribute is absolutely consistent with the public interest. In fact, it is essential to the public interest for networks, like all participants in the broadcast business model, to seek a second stream of revenue. If free, over-the-air television is to remain the home of compelling programming, be it the Super Bowl, the World Series, expensive scripted content such as the popular new hit *Glee*, or the most watched program on television, *American Idol*, broadcasters, and networks especially, must develop a second revenue stream to remain competitive. Unless broadcast networks receive fair compensation for their efforts, an increasing amount of popular content will migrate to cable channels, which enjoy dual revenue streams. Already, *Monday Night Football* has moved from the over-the-air ABC network to ESPN; college football's Bowl Championship Series games similarly are moving from the FOX Network to ESPN; and a variety of Major League Baseball and National Basketball League playoff games each year now appear on ESPN or TBS instead of free broadcast television. Absent fair compensation for networks, this trend will accelerate, leaving viewers who rely on over-the-air television with fewer choices and less access to desirable content.

Thus, just as stations affiliated with the FOX Network seek to receive payments from MVPDs in exchange for retransmission consent, it is eminently reasonable that Fox likewise wants to be compensated, given that network programming provides a substantial amount of the value in the retransmission consent exchange. Fox's attempt to develop a second revenue stream – for itself, its owned stations and its affiliated stations – is part of a shift in the economics of the television industry that is vital if free, over-the-air television is to survive and thrive in the 21st century. In short, if a station wants to affiliate with Fox, thereby benefiting from its iconic brand

and popular programming (which draws audiences to local programming as well), there is no reason that Fox should be foreclosed from seeking the station's help in an effort to preserve the viability of the network programming service.[22]

To be clear, Fox cannot and does not unilaterally demand a share of affiliates' revenues; to the contrary, Fox must negotiate with each affiliate just as each affiliate must negotiate with MVPDs. At the end of the day, the outcome of these marketplace negotiations between the networks and their affiliates is nothing of the Petitioners' concern.[23]

Nor should the MVPDs be heard to allege, as Time Warner Cable does, that broadcast networks are "improperly" seeking to use retransmission consent to "capitalize" on their copyright interest in network programming.[24] Quite clearly, Congress established the retransmission consent regime to provide stations with an opportunity to seek compensation above and beyond the artificially qualified compulsory copyright license. Time Warner Cable challenges a network's right to participate in retransmission consent because, it alleges, the network is "seeking a second payment for the same content already covered by the compulsory license."[25] This reasoning defies logic; if Time Warner Cable's obtuse theory were correct, it

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22 Although network programming is distributed nationally, it is highly attractive to local audiences and serves a key role in helping to attract viewers (and revenues) to support locally-originated programming, such as news and public affairs shows. Indeed, local stations choose to affiliate with networks because they appreciate that networks' investments in compelling content enables stations to broadcast popular programming that serves the tastes, needs and interests of local audiences.

23 There can be no dispute that networks are entitled to be compensated for their investments in producing and acquiring popular programming. It should be noted that when a network seeks to be compensated from the pool of revenues that an affiliate generates via retransmission consent payments, it actually is *less* burdensome to a local station than other, perfectly legal alternative methods by which a network could seek to be paid for its efforts. By encouraging affiliates to bargain for cash compensation in exchange for retransmission consent, and seeking to be compensated as an affiliate generates retransmission consent revenues, a network enables affiliates to develop new sources of income that can be used in part to pay for network programming. This reality undermines any claim that a network's role in retransmission consent injures local stations.

24 Time Warner Cable Comments, at 9.

25 *Id.*

would be equally the case that any retransmission consent payment made to a local station would result in a so-called "second payment" for locally-produced content copyrighted by individual stations. There is nothing unique to this discussion about the role of networks. For that matter, given that the compulsory copyright license scheme does not provide broadcast stations *any* compensation for an MVPD's in-market retransmission of the station's signal, Time Warner Cable's argument essentially amounts to an effort to set the clock back 20 years and resuscitate a regulatory regime in which MVPDs were permitted to retransmit local broadcast signals for free.

More importantly, the Commission already made clear, when it first promulgated rules to implement Section 325 of the Act, that the retransmission consent right "may be bargained away by broadcasters" and that because of "the statutory provision holding that existing or future licensing agreements are to be unaffected by retransmission consent . . . programmers can negotiate such limitations with broadcast stations, *separate and apart from any copyright arrangements*."[26] The FCC also noted that a broadcast station's retransmission consent "may be freely bargained away in future programming contracts."[27] Thus, having chosen in 1992 to provide broadcasters with a freely alienable retransmission consent right as a supplement to (but not a replacement for) the compulsory license, Congress plainly rejected the very argument that Time Warner Cable seeks to advance here.[28]

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26 *1993 Order*, 8 FCC Rcd at 3005 (emphasis supplied).

27 *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, 9 FCC Rcd 6723, 6746 (1994) (*citing* S. Rep. No. 102-92, at 36 (1991) ("It is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations.")).

28 Time Warner Cable incongruously cites to the *1993 Order* in an attempt to augment its copyright theory. *See* Time Warner Cable Comments, at 9 n. 23 (*citing 1993 Order*, 8 FCC Rcd at ¶ 173). But the FCC's conclusions actually serve to bolster Fox's position – in fact, as the Time Warner Cable cite reveals, "Congress created a new communications right in the broadcaster's signal, *completely separate from the programming contained in the signal*." *Id.* (emphasis supplied). Thus, Congress devised a scheme whereby it intended that separate payments would be made for retransmission consent even though the "same content" already was covered by

(cont'd)

In any event, it is striking that commenters levy their charges against broadcast networks without so much as acknowledging, let alone attempting, to explain how their allegations can be reconciled with the Commission's conclusion in the *Reciprocal Bargaining Order* that the retransmission consent rules are not intended to "interfere with the network-affiliate relationship."[29]

Equally significant, the *Petition* cites to only *two* specific instances in which a network allegedly impacted an affiliate's retransmission consent negotiation with an MVPD[30] – and in both of those cases, *the affiliate and the MVPD entered into a mutually acceptable agreement for carriage of the stations.* Although they appear reticent to admit it, MVPDs cannot point to a single example where a network-affiliation agreement served as an obstacle to the successful conclusion of an in-market retransmission consent deal. Time Warner Cable's assertion that the networks' role "significantly increase[s] the likelihood of disputes that result in service disruptions" is without basis.[31]

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the copyright license. Of course, in doing so, Congress implicitly recognized that copyright license payments were inadequate to fairly compensate broadcasters for the redistribution of their popular content. In the absence of the compulsory license, there would be no need for retransmission consent, as broadcasters simply would have the right under copyright law to negotiate fair market compensation for the value of the programming that MVPDs seek to redistribute.

29 *Reciprocal Bargaining Order*, 20 FCC Rcd at 10354.

30 *See Petition*, at 21.

31 Time Warner Cable Comments, at 10. Several MVPDs also repeat the tired claim that the networks' efforts to be compensated for their programming result in higher retail rates. *See, e.g., Petition* at 10; Comments of Cox Enterprises, Inc., MB Docket No. 10-71 (filed May 18, 2010), at 7 ("Cox Comments"). As a variety of commenters have pointed out, however, aggregate retransmission consent fees constitute just a small fraction of overall MVPD programming costs, and an even smaller percentage of MVPD revenues. *See, e.g.*, Gray Television Comments, at 6; NAB Comments, at 45-50; Coalition Comments, at 4. In addition, given that MVPDs are enormously profitable businesses, there is no reason (other than a refusal to diminish their profit margins) why they have to pass on to consumers incremental retransmission consent expenses. It is a fundamental tenet of a competitive marketplace that as costs rise, profit margins may shrink. Petitioners present no basis whatsoever to support their belief that MVPDs should be insulated from these market forces, or that operators' high profit margins should be treated as somehow impregnable, without regard to cost. Further, in a free market retransmission consent negotiation, an MVPD and a local station ultimately will agree on a fair

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Furthermore, despite some commenters' rhetoric suggesting that affiliates are harmed by their agreements with networks,[32] the *only* affiliate to complain about this issue in the opening comments was Cox,[33] an enterprise whose mixed motivations are fraught with conflicts of interest, given that its 15 broadcast stations are co-owned with a cable multiple system operator (the 3rd-largest cable operator in the country). Every single other affiliate group that filed comments, along with the affiliate associations of each of the major English-language broadcast networks, the National Association of Broadcasters and state broadcaster associations representing 49 states and the District of Columbia, weighed in to support the existing retransmission consent regime; *none of them* backed the *Petition*'s call for an inquiry into the role of broadcast networks.[34]

The FCC should find it curious, to say the least, that the *Petition*'s portrait of widespread affiliate harm garners virtually no support from the very entities that the Petitioners claim need protection.

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price that reflects the overall value of the station's signal to the MVPD's channel line-up. That value necessarily must account for any highly popular network programming that comprises a portion of a network affiliate's signal. But how an affiliate chooses to allocate its retransmission consent revenue should have no bearing on the ultimate price paid by an MVPD. There is simply no economic basis for Cox to assert, at 7, that a network sharing in retransmission consent puts "upward pressure" on rates – unless of course Cox is acknowledging that absent a network's presence, an MVPD would use its market power to demand that affiliates accept an artificially reduced price.

32 *See, e.g.*, *Petition*, at 22-24; APPA Comments, at 6; Time Warner Cable Comments, at 8.

33 *See* Cox Comments, at 7.

34 *See generally* NAB Comments; Joint Comments of Broadcast Television Licensees, MB Docket No. 10-71 (filed May 18, 2010); Comments of Fox Television Affiliates Association, MB Docket No. 10-71 (filed May 18, 2010); Comments of State Broadcasters Associations, MB Docket No. 10-71 (filed May 18, 2010).

III. THE COMMISSION ALREADY HAS DEVELOPED AN AMPLE RECORD OF EVIDENCE CONFIRMING THAT PROGRAM SUPPLIERS DO NOT ENGAGE IN TYING AND THAT BUNDLING FOSTERS CONSUMER WELFARE

As part of its proceeding reviewing wholesale bundling practices in 2008, the Commission received a wealth of information, from Fox and many others, confirming that neither broadcasters nor pay channel owners engage in take-it-or-leave-it tying arrangements in connection with the licensing of programming.[35] Fox, in particular, explained that it does not compel any MVPD to purchase any broadcast station or cable programming service that the MVPD does not wish to purchase.[36] Rather, Fox makes all of its programming services available for purchase to all MVPDs – both large and small – on a stand-alone basis, and always offers MVPDs reasonable rates, terms and conditions in exchange for carriage.[37] Fox also offers MVPDs the opportunity to purchase more than one of its programming services as part of an economically efficient package that reduces transaction costs for both parties.

A handful of commenters filing in support of the *Petition* nonetheless assert that broadcasters engage in mandatory "tying" of broadcast stations and pay channels, which they claim results in distortions to the retransmission consent process.[38] These commenters apparently would like to pretend that the 2008 record does not exist; indeed, they have simply ignored it in repeating their unsupported "tying" allegations here. The Commission, however, easily can dismiss these claims based on the evidence gathered as part of the wholesale bundling

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35 *See In re Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Notice of Proposed Rulemaking, 22 FCC Rcd 17791 (2007).

36 *See* Comments and Reply Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc., MB Docket No. 07-198 (filed Jan. 4 and Feb. 12, 2008) ("Fox Wholesale Bundling Submissions").

37 *See id.*

38 *See, e.g.*, Comments of Starz Entertainment Group, Inc., MB Docket No. 10-71 (filed May 18, 2010), at 5-6; Comments of RCN Telecom Services, Inc., MB Docket No. 10-71 (filed May 18, 2010), at 6-7; Comments of the Africa Channel, MB Docket No. 10-71 (filed May 18, 2010), at 3; Comments of Media Access Project, MB Docket No. 10-71 (filed May 18, 2010), at 7; *see also*, Petition at 34.

proceeding. That evidence, including submissions from cable operators, overwhelmingly confirms both that no "tying" is occurring and that the competitive multichannel video programming marketplace functions well, providing American television viewers with a collection of programming choices that is the envy of the world.[39]

In particular, as Fox's comments in that proceeding indicated, the marketplace permits both MVPDs and programming vendors to negotiate mutually beneficial carriage arrangements that provide value to both parties. These negotiations often result in MVPDs electing to purchase broadcast and cable programming services in packages of channels sold together. Far from being forced to accept these packages, most MVPDs actually prefer to purchase multiple channels at once, both because they can achieve transaction cost savings and because they have long recognized the benefit of offering their subscribers packages of program channels. Programming vendors seeking to increase distribution of their video services also offer MVPDs economic and other incentives to purchase multiple channels. These incentives, ranging from volume discounts to cash payments in the form of marketing support, foster competition and generate benefits for consumers.[40] Congress envisioned just this type of bargaining in the retransmission consent context: "[Some] broadcasters may not seek monetary compensation, but instead [may] negotiate other issues with cable systems, such as joint marketing efforts, the

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[39] *See, e.g., In re Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, Comments of Comcast Corporation (filed Jan. 4, 2008), at 2; Comments of NBC Universal, Inc. and NBC Telemundo License Co. (filed Jan. 4, 2008), at 42-45; Comments of The National Cable & Telecommunications Association (filed Jan. 4, 2008), at 3-9; Comments of Time Warner Inc. (filed Jan. 4, 2008), at 1; Comments of The Walt Disney Company (filed Jan. 4, 2008), at 35-36; Comments of Viacom Inc. (filed Jan. 4, 2008), at 3-23.

[40] *See generally*, Fox Wholesale Bundling Submissions.

opportunity to provide news inserts on cable channels, *or the right to program an additional channel on a cable system*."[41]

The record in the wholesale bundling proceeding also contains unrebutted expert analyses confirming not only that the video programming market is highly competitive, but that Fox does not engage in "tying" practices that compel the purchase of any of its networks (or any combination of networks).[42] Specifically, Dr. Bruce Owen found that not a single Fox-owned cable programming channel is carried on every cable system in the United States.[43] In addition, cable systems carry Fox cable networks in more than 100 different combinations of program packages.[44] Whether a network is carried depends on a variety of competitive factors, but in no event is any MVPD compelled to carry any network.

In short, the wholesale bundling proceeding includes ample record evidence refuting the false allegations, made by some commenters here, that non-existent "tying" practices cause harm in connection with retransmission consent. Rather than repeat all of that abundant evidence in these reply comments, Fox respectfully requests that its submissions in the bundling proceeding, together with Dr. Owen's economic analyses, be incorporated into the record of this proceeding.[45]

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41 *See* S. Rep. No. 102-92 (1991), at 35-36 (emphasis supplied).

42 *See* Fox Wholesale Bundling Submissions.

43 *See id.* at Appendix B to Comments, *Wholesale Packaging of Video Programming*, Dr. Bruce M. Owen, Economists Incorporated (Jan. 4, 2008).

44 *See id.*

45 As others have observed in opening comments in this matter, it is especially ironic for MVPDs to complain about bundling practices in connection with retransmission consent, since for nearly two decades following the passage of the retransmission consent statute, cable operators simply refused to pay cash compensation for broadcast programming. *See, e.g.*, Sinclair Comments, at 2; Belo Comments, at 5. In any event, the FCC itself has expressly permitted broadcasters to offer retransmission consent on a barter basis (*e.g.*, carriage of associated cable networks or other broadcast stations). As the FCC has explained: "We do not find anything to suggest that, for example, requesting an MVPD to carry an affiliated channel, another broadcast signal in the

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IV. THE COMMISSION CANNOT IGNORE THE CLEAR STRICTURES OF SECTION 325 OF THE ACT, WHICH ABSOLUTELY PROHIBITS MVPD CARRIAGE OF A BROADCAST SIGNAL IN THE ABSENCE OF A STATION'S EXPRESS CONSENT

Numerous commenters in this matter advised the Commission that Section 325 of the Act serves as an absolute bar to granting the relief requested in the *Petition*.[46] As these comments explain in great detail, the FCC has no authority to allow an MVPD to temporarily carry a broadcast station, or to compel a station owner to accept carriage on terms and conditions mandated by an arbitrator, absent the station's consent. Section 325(b)(1) of the Act specifies that no MVPD "shall retransmit the signal of a broadcasting station, or any part thereof, except . . . with the express authority of the originating station . . . ."[47] Neither the *Petition* nor any of the comments submitted here provides any rational basis for concluding otherwise.

Time Warner Cable trots out a creative argument, but it completely misses the mark in attempting to analogize the FCC's actions in the *2010 Program Access Order* to the context of retransmission consent.[48] As Time Warner Cable notes, the Commission in the *2010 Program Access Order* established a procedure whereby an MVPD can seek a temporary standstill permitting it to continue carrying certain multichannel programming networks during the

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same or another market, or digital broadcast signals is impermissible or other than a competitive marketplace consideration. . . . [and] we point out that these are bargaining proposals which an MVPD is free to accept, reject or counter with a proposal of its own." *In re Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445, 5469-70 (2000) (the "*Good Faith Order*").

[46] *See e.g.*, Belo Comments, at 7-10; NAB Comments, at 62-80; Lin Comments, at 12; Coalition Comments, at 10; Comments of Nexstar Broadcasting, Inc., MB Docket No. 10-71 (filed May 18, 2010), at 4-8.

[47] 47 U.S.C. § 325(b)(1).

[48] *See* Time Warner Cable Comments, at 11-13 (*citing In re Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd 746 (2010) (the "*2010 Program Access Order*")).

pendancy of a program access dispute.[49] Time Warner Cable claims that, because the Commission asserts the right to order temporary standstills for pay channels – notwithstanding those channels' rights under copyright law to control the redistribution of their intellectual property – the FCC should be deemed to have the same authority over broadcast signals despite Section 325 of the Act.

This inapt analogy, however, simply does not hold water. What Time Warner Cable neglects to acknowledge – and what fundamentally undermines its argument – is that Congress provided the Commission with express authority in the context of program access to abrogate copyright law and compel carriage of a cable network, even absent the channel owner's consent. Indeed, the very purpose of Section 628 of the Act (the program access statute) was to "address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies."[50] Thus, Section 628 directed the Commission to promulgate rules that require certain MVPDs to make their owned programming services available, even in situations when they otherwise would choose not to do so.

Having obtained from Congress the broad authority to compel a pay channel to make its service available as a general matter, it is easy to see how the Commission relied on its ancillary authority to conclude that it had jurisdiction to compel carriage only on an interim basis. The program access framework, however, is markedly different than the statutory structure for

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[49] *See 2010 Program Access Order*, 25 FCC Rcd at 794-97.

[50] H.R. Rep. No. 102-862 (1992), at 93; *see also* 47 U.S.C. § 548(b) (providing that "[i]t shall be unlawful for a cable operator [or] a satellite cable programming vendor in which a cable operator has an attributable interest . . . to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any [MVPD] from providing satellite cable programming . . . to subscribers or consumers.").

retransmission consent. Unlike in the program access context, where Congress essentially gave the Commission limited permission to trump copyright, the retransmission consent regime contains Congress' express directive that a broadcast station's signal not be distributed by an MVPD absent the station's consent. Contrary to Time Warner Cable's argument, the Commission's ability to "protect the public interest by authorizing MVPDs to continue carriage of copyrighted programming in program access disputes" does not automatically translate into an ability to "do the same" in the retransmission consent context.[51]

The Commission itself has recognized that Congress took vastly different approaches to the regulation of pay channels commonly owned with an MVPD and the regulation of broadcast signals under retransmission consent. In particular, in the *Good Faith Order*, the FCC cited to Section 628 of the Act in observing that "when Congress intends the Commission to directly insert itself in the marketplace for video programming, it does so with specificity."[52] For that reason, the FCC has rejected MVPDs' previous requests for standstill relief in connection with retransmission consent, finding that the constraints of Section 325 of the Act "unambiguous[ly]" foreclose a retransmission standstill requirement.[53] The Commission added that it has "no latitude . . . to adopt regulations permitting retransmission during good faith negotiation or while a good faith or exclusivity complaint is pending . . . where the broadcaster has not consented to such retransmission."[54]

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[51] Time Warner Cable Comments, at 13.

[52] *Good Faith Order*, 15 FCC Rcd at 5455.

[53] *Id.* at 5471. Furthermore, "[d]espite the arguments of the satellite industry and other MVPDs, [there is] nothing supporting a construction of" the Act "that would grant the Commission authority to impose a complex and intrusive regulatory regime similar to the program access provisions . . . of the Communications Act." *Id.* at 5455.

[54] *Id.* at 5471. Indeed, when it has exercised its limited statutory right to intercede in the video programming marketplace, the Commission has gone out of its way to emphasize the narrow scope of its actions. For

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Time Warner Cable's reliance on *Southwestern Cable*[55] and *Sky Angel*[56] cannot rescue its otherwise flawed argument. In *Southwestern Cable*, a case that preceded the passage of Section 325 of the Act by 25 years, the Supreme Court sanctioned the Commission's use of ancillary authority to order a standstill that preserved the status quo, which in that case served to continue to *prevent* an MVPD from carrying a programming service.[57] The Court did not bless an FCC mandate to affirmatively order carriage, which is what Time Warner Cable intimates in its comments, and the Court certainly did not endorse a carriage mandate that would ignore countervailing statutory language (such as Section 325).[58] Moreover, in *Sky Angel*, the FCC made clear that its ability to act on a programming service standstill petition was limited to "program access cases," for which the Commission has Section 628 to use as the hook for its invocation of ancillary authority.[59] Put simply, in light of Section 325 of the Act, neither *Southwestern Cable* nor *Sky Angel* can serve as the basis for a temporary standstill requirement, nor can they support Time Warner Cable's effort to create for the Commission plenary authority to impose standstills when none exists.

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example, in imposing the new standstill rule for pay channels in the *2010 Program Access Order*, the FCC said that "[t]he specific procedures adopted herein *only apply to requests for a standstill involving program access complaints* . . . ." *See 2010 Program Access Order*, 25 FCC Rcd at 794 (emphasis supplied).

55 *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) ("*Southwestern Cable*").

56 *In re Sky Angel U.S., LLC, Emergency Petition for Temporary Standstill*, Order, DA 10-679 (rel. Apr. 21, 2010) ("*Sky Angel*").

57 *See Southwestern Cable Co.*, 392 U.S. at 178-179.

58 *See id.*

59 *Sky Angel*, at ¶ 6, n. 31. As the D.C. Circuit has made clear, the "Commission may exercise this 'ancillary' authority only if it demonstrates that its action . . . is 'reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities.'" *Comcast Corp. v. FCC*, 600 F. 3d 642, 644, 653 (2010) ("ancillary authority is really incidental to, and contingent upon, *specifically delegated powers under the Act*") (internal citations omitted) (emphasis in original). Section 325 provides no comparable hook on which the FCC could hang ancillary jurisdiction for the imposition of a standstill requirement in retransmission consent negotiations; indeed, a standstill would be flatly inconsistent with Section 325.

Even absent the overlay of Section 628, copyright law in general does not affirmatively proscribe a third party's the use of protected content; it provides penalties against those who engage in infringement.[60] Section 325, in contrast, provides an express bar to the retransmission of broadcast content without prior approval from the originating station. So, for this reason as well, Time Warner's too-clever analogy crumbles upon closer inspection.

V. CONCLUSION

In sum, the retransmission consent regime works, and flourishing competition has brought numerous benefits to consumers, broadcasters and MVPDs alike. Notwithstanding this competition, or more likely because of it, a handful of powerful and profitable cable, satellite and telco video providers have come forward masquerading as the victims of a regulatory structure that in fact relies on free market negotiations to ensure that broadcasters receive fair compensation for their investments in creating and distributing what is indisputably some of the most compelling and popular programming on television. The Commission should reject the Petitioners' efforts to advance their pecuniary interests through the rulemaking process by promptly dismissing the *Petition* and confirming that the retransmission consent regime works as Congress intended.

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[60] *See, e.g.,* 17 U.S.C. § 111(c)(2) ("the willful or repeated secondary transmission to the public by a cable system of a primary transmission made by a broadcast station . . . is actionable as an act of infringement . . . .").

Respectfully submitted,

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June 3, 2010

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Mediacom Communications Corp., Complainant,	)	
	)	
v.	)	CSR No. 8233-C
	)	CSR No. 8234-M
Sinclair Broadcast Group, Inc., Defendant.	)	
	)	

EX PARTE COMMENTS OF FOX BROADCASTING COMPANY IN RESPONSE TO TIME WARNER CABLE'S COMMENTS

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Before the
FEDERAL COMMUNICATIONS COMMISSION
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EX PARTE COMMENTS OF FOX BROADCASTING COMPANY IN RESPONSE TO TIME WARNER CABLE'S COMMENTS

Fox Broadcasting Company ("Fox"), by and through its attorneys, pursuant to the Public Notice issued by the Commission November 6, 2009,[1] respectfully submits this response to the *ex parte* comments submitted by Time Warner Cable, Inc. ("TWC") as part of the record of the above-captioned proceedings.[2]

I. INTRODUCTION AND SUMMARY

First and foremost, TWC readily admits that it already has entered into a retransmission consent agreement with Sinclair. Accordingly, TWC's attacks on the Fox network-affiliation agreement, and its allegations that Fox somehow has served as an obstacle to

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1 Public Notice, Establishment of "Permit-But-Disclose" *Ex Parte* Procedures for Mediacom Communications Corporation's Retransmission Consent Compliant and Petition for an Emergency Order Granting Interim Carriage Rights (CSR-8233-C, CSR-8234-M), DA 09-2396 (rel. Nov. 6, 2009) (the "Public Notice").

2 *See Mediacom Communications Corp., Complainant v. Sinclair Broadcast Group, Inc., Defendant, Ex Parte Comments of Time Warner Cable, Inc. in Support of Medicacom Communications Corporation's Retransmission Consent Complaint*, File Nos. CSR-8233-C and CSR-8234-M (dated Dec. 8, 2009) (the "*TWC Comments*"). Although the Public Notice designated these proceedings as permit-but-disclose under the *ex parte* rules, there is some ambiguity as to whether the Commission intended to limit the right to make *ex parte* presentations to Sinclair and Mediacom. If the Commission accepts the *ex parte* submission of TWC, Fox hereby respectfully requests leave, to the extent necessary, to file this *ex parte* response.

the successful negotiation of retransmission consent between TWC and Fox affiliated stations, ring hollow. The true motivation for TWC's submission here stems from its endeavor to gain leverage in its own retransmission consent negotiations with broadcast stations commonly owned with Fox. The *TWC Comments*, however, raise no issues warranting Commission review, and appear to have been interposed only as part of TWC's attempt to malign Fox's efforts to gain fair compensation for its incredibly valuable programming.

Moreover, these proceedings are an improper forum for TWC's complaints, given that TWC's purported concerns about Fox's network-affiliation agreement have no bearing whatsoever on the dispute between Sinclair and Mediacom. The *TWC Comments*, while ostensibly filed in "support" of Mediacom, are in fact a specifically targeted attack on Fox and its perfectly legal business practices. While Fox is reluctant even to file this response, given that neither it nor TWC is a participant in these proceedings, Fox feels that it is necessary to weigh in to ensure that TWC's attempt to manipulate and abuse the Commission's processes does not go unanswered.

Fox's network-affiliation agreements fully comply with the FCC's rules and policies, as well as the transfer of control provisions of the Communications Act of 1934 (the "Act"). For stations that choose to affiliate with Fox, Fox has negotiated a routine right of approval with respect to a station's agreement with a multichannel video programming distributor ("MVPD") for retransmission of Fox's network programming. Importantly, this routine consent clause does nothing to restrict an affiliated station's ability to grant retransmission consent – even if Fox were to refuse to approve a station's deal, the refusal at most would affect the network-affiliate relationship, but based on Commission precedent, would not prevent the station licensee from granting retransmission consent for its entire signal to any MVPD that the licensee chooses.

Commission precedent is abundantly clear that the retransmission consent rules are not intended to "interfere with the network-affiliate relationship or . . . preclude specific terms contained in network-affiliate agreements . . . ."[3] The FCC has emphasized that "neither the text nor the legislative history" of the good faith bargaining statutes "indicate a congressional intent to restrict the rights of networks and their affiliates through the good faith or reciprocal bargaining obligation to agree to limit an affiliate's right to redistribute affiliated programming."[4] When it first promulgated rules to implement the retransmission consent statute, the Commission found that a broadcast station's retransmission consent "may be freely bargained away in . . . programming contracts."[5] And the Commission repeatedly has recognized that the good faith bargaining rules do not preclude stations from entering into contracts that restrict their authority to grant retransmission consent to an MVPD.[6] TWC cannot simply ignore, or will away, this precedent.

In short, the *TWC Comments* are nothing more than an attempt to embroil the Commission in private business negotiations between networks and their affiliates, in order to further TWC's private, economic interests, not the public interest. Fox urges the Commission, to

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[3] *In re Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004: Reciprocal Bargaining Obligation*, 20 FCC Rcd 10339, 10354 (2005) ("*Good Faith Order*").

[4] *Id.*.

[5] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, 9 FCC Rcd 6723, 6746 (1994) (the ("*Retransmission MO&O*").

[6] *See, e.g., In re ATC Broadband LLC and Dixie Cable TV, Inc. v. Gray Television, Inc.*, 24 FCC Rcd 1645 (2009) ("*ATC Broadband*"); *In re Monroe, Georgia Water Light and Gas Commission D/B/A Monroe Utilities Network v. Morris Network, Inc.*, 19 FCC Rcd 13977 (2004) ("*Monroe*").

the extent that it otherwise considers the matters that actually are in dispute between Mediacom and Sinclair, to disregard the *TWC Comments*' attacks on Fox.

II. FOX'S NETWORK-AFFILIATION AGREEMENTS AND PRACTICES ARE FULLY CONSISTENT WITH THE COMMISSION'S RETRANSMISSION CONSENT RULES AND POLICIES

A. Commission Precedent Is Clear That the Good Faith Bargaining Obligations Do Not Interfere With the Network-Affiliate Relationship

Although TWC is a sophisticated business party with 14 million cable television subscribers, it seeks here to invoke the government's aid as it negotiates for retransmission consent with broadcasters. As the second largest cable operator in the country, however, TWC is more than capable of negotiating in a competitive free market without need of government intervention. In fact, TWC already has successfully negotiated a retransmission consent deal for Sinclair's stations, including stations that are affiliated with Fox.

TWC nonetheless claims that Fox's network-affiliation agreement with Sinclair constitutes "interference" in the retransmission consent process, and that Fox "brazenly" has sought to insert itself into the negotiation between Sinclair and TWC.[7] These are quite remarkable allegations, mostly because they are untrue, but all the more so because if any party here is "brazenly" interfering with a private business relationship, it is TWC. Yet even as it attempts to spin reality on its head, TWC cites no authority for its assertion that Fox's agreement with Sinclair violates the Commission's good faith bargaining rules, under either the *per se* or totality of the circumstances test.[8]

Specifically, the Commission recognized when it first implemented Section 325 of the Act (the retransmission consent statute) that the retransmission consent right "may be

[7] *TWC Comments*, at 2.

[8] *See id.* at 7-8.

bargained away by broadcasters" and that because of "the statutory provision holding that existing or future licensing agreements are to be unaffected by retransmission consent . . . programmers can negotiate such limitations with broadcast stations, separate and apart from any copyright arrangements."[9] The FCC also noted that a broadcast station's retransmission consent "may be freely bargained away in future programming contracts."[10] As TWC describes, a provision in Fox's network-affiliation agreement provides that a broadcast licensee shall not, without Fox's prior approval, "grant its consent to the transmission or retransmission, by any [MVPD] . . . of Station's broadcast of any Fox programming."[11] Fox, as a network owner and programmer, has done nothing more than bargain for precisely the limitation that Congress and the Commission envisioned.

The FCC reiterated, when it promulgated the good faith bargaining rules, that "neither the text nor the legislative history" of the good faith bargaining statutes "indicate a congressional intent to restrict the rights of networks and their affiliates through the good faith or reciprocal bargaining obligation to agree to limit an affiliate's right to redistribute affiliated programming."[12] Section 76.65 of the FCC's rules was "not intend[ed] to affect the ability of a network affiliate agreement to limit redistribution of network programming."[13] The Commission

[9] *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 3005 (1993) (the "*1993 Order*") (emphasis in original). Thus, TWC's suggestion, at 7, n. 22, that a network's right to seek compensation from an affiliate is somehow restricted by the compulsory copyright license is plainly inconsistent with the *1993 Order*.

[10] *Retransmission MO&O*, at 6746 (*citing* S. Rep. No. 102-92, at 36 (1991) ("It is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations.")).

[11] *See TWC Comments*, at 3.

[12] *Good Faith Order*, 20 FCC Rcd at 10354. Furthermore, the FCC said that it "perceive[d] no intent on the part of Congress that the reciprocal bargaining obligation interfere with the network-affiliate relationship or . . . preclude specific terms contained in network-affiliate agreements . . ." *Id.*

[13] *Id.* at 10355.

also has emphasized consistently that the "mere existence of an underlying agreement" between a network and an affiliate "is [not] a violation of the good faith negotiation requirement," since the obligation "applies to negotiations between MVPDs and broadcast stations, and not between a network and an affiliate."[14]

In resolving good faith bargaining disputes, the FCC explicitly has found that broadcast stations are permitted to enter into, and honor, network-affiliation agreements that contain provisions restricting a station's right to grant retransmission consent to an MVPD.[15] Most recently, the Commission held earlier this year that a station was well within its authority to break off bargaining with an MVPD when it discovered, after initially engaging in negotiations, that it was precluded by the terms of its network-affiliation agreement from granting consent to the MVPD in question.[16] The FCC "decline[d] to find that [the station's] conduct" in ceasing negotiations "violated the Commission's good faith standards."[17] In particular, the FCC said that a "negotiation[ ] for which a broadcaster is contractually precluded from reaching consent may be truncated . . . ."[18]

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14 *Monroe*, 19 FCC Rcd at 13980, n. 24.

15 *See ATC Broadband*, 24 FCC Rcd at 1648-49; *Monroe*, 19 FCC Rcd at 13980, n. 24.

16 *See ATC Broadband*, 24 FCC Rcd at 1645.

17 *Id.* at 1649 (*citing Good Faith Order*, 20 FCC Rcd at 10345).

18 *Id.* TWC's effort to dismiss this precedent on the sole basis that it relates to a station's negotiations with an MVPD for out-of-market carriage is unavailing. *See TWC Comments*, at 8, n. 27. TWC suggests that a network's right to restrict a station from granting retransmission consent to out-of-market MVPDs is "qualitatively different" than the provision cited in Fox's agreement. *Id.* Yet TWC does not even attempt to explain why there is any difference, nor could it. From the perspective of an MVPD that desires to carry a broadcast station (presumably because its programming would be popular to the MVPD's subscribers), the station's refusal to grant consent, for whatever reason, has the same impact regardless of geography. The MVPD is precluded from gaining access to programming that it desires and otherwise would like to carry. There is no qualitative difference, and certainly no legal distinction, between this precedent and the Fox provision that TWC has chosen to attack.

If a network-affiliation agreement lawfully can *completely ban* a station from granting retransmission consent to an MVPD, it strains credulity for TWC to argue that Fox's agreement – which calls only for the network to have an approval right as part of the negotiating process – results in a violation of the good faith obligations. [19]

Notwithstanding this unambiguous precedent, TWC also suggests that the mere existence of the Fox approval provision constitutes a *per se* good faith bargaining violation because a broadcaster allegedly is unable to "designate a representative with authority to make binding representations" in a retransmission consent negotiation.[20] This makes little sense. The Commission has never held that its *per se* good faith rules require a bargaining representative literally to make a decision about a carriage offer or counter-offer on the spot. TWC would have the Commission believe that any time a broadcaster's bargaining representative (or an MVPD's, for that matter) takes time to consider an offer in more detail, or evaluates its economic impact or consults with his or her executives or business partners, that representative automatically should be deemed to lack authority to conclude a deal. The Commission's rules, however, should not compel either party to make uninformed decisions about retransmission consent bargaining proposals; these agreements could have far-reaching economic consequences and they deserve careful deliberation.

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19 Likewise, when the Commission granted consent to News Corporation's ("News Corp.") acquisition of DirecTV, it imposed on News Corp. certain conditions requiring it to submit to binding arbitration in the event of a bargaining impasse with respect to retransmission consent negotiations for its owned broadcast stations. *See In re General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corporation Limited, Transferee*, 19 FCC Rcd 473, 572 (2004). Tellingly, the FCC "extend[ed] our conditions to apply *whenever News Corp. negotiates retransmission consent agreements on behalf of independently owned Fox network affiliates*." *Id.* (emphasis supplied). Inasmuch as the Commission implicitly approved a scenario in which Fox literally could assume the role of negotiator for non-owned stations, there can be little doubt about the validity of Fox's approval provision.

20 *TWC Comments,* at 8.

Aside from the irrational results that would stem from its analysis of the *per se* rules, TWC's interpretation cannot be squared with the FCC's precedent. Again, if a station is permitted to *outright refuse* to reach a retransmission consent agreement based on its contract with a network, it cannot be a *per se* violation for that station's representative to decline temporarily to conclude a deal pending further evaluation of an offer.

TWC also erroneously asserts that Fox has a "veto" right over its affiliates' retransmission consent deals; that Fox has usurped its affiliates' "autonomy"; that it has "hijack[ed]" the negotiating process; and that it seeks to elicit a "tax" on retransmission consent compensation.[21] No matter how much colorful verbiage it uses to mischaracterize the approval provision in Fox's network-affiliation agreement, however, TWC cannot sustain its allegations in the face of reality. Fox's agreements with its affiliates do not give the network an ability to enjoin any affiliate from granting its retransmission consent to any MVPD with which it seeks to do business.

Even if Fox were to refuse to grant its approval to any particular agreement between an affiliated station and an MVPD, Fox could not stop the station from going forward with a deal. The Commission's precedent makes clear that once a station grants retransmission consent to an MVPD, the MVPD has the right under the Act to carry that station's entire signal – even if the text of the station's affiliation agreement purports to restrict it from granting consent.[22] Although the station's actions might constitute a breach of its affiliation agreement (for which it might face consequences), the FCC has stressed that it will not "interject" itself into

21 *Id.* at 2-3, 7.

22 *See Monroe*, 19 FCC Rcd at 13980; *see also 1993 Order*, 8 FCC Rcd at 3004 ("[B]roadcasters cannot bargain over retransmission consent rights to individual programs carried via broadcast signals. Any bargaining must be for retransmission consent rights to the entire signal.").

a private contractual dispute, which should be resolved by the parties or a court of competent jurisdiction.[23] Quite clearly, Fox cannot, as TWC asserts, serve as an "insurmountable hurdle" to MVPDs' ability to reach retransmission agreements with any Fox affiliate.[24]

Fox obviously has no way to verify the veracity of TWC's allegations about how Sinclair described Fox's approval provision during Sinclair's negotiation with TWC. Regardless, Fox *never* stripped Sinclair of control over its negotiations, or ability to conclude a deal, with TWC.[25] Nor did Fox ever demand that Sinclair retain the right to terminate a Sinclair-TWC retransmission deal.[26] In fact, although TWC attempts to downplay it, TWC *did* enter into a retransmission consent agreement with Sinclair, an agreement to which Fox provided its approval under the very provision in question here.[27]

Furthermore, it is striking that TWC levies its charges against the Fox network-affiliation agreement without so much as acknowledging, let alone attempting to explain how its allegations can be reconciled with, the Commission's conclusion in the *Good Faith Order* that the retransmission consent rules are not intended to "interfere with the network-affiliate

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[23] *Monroe*, 19 FCC Rcd at 13981. In this connection, since Fox seeks to ensure that its content is available to the widest possible audience, and since it would be economically harmful to Fox if its programming were not made available to the nearly 90 percent of American households that subscribe to an MVPD, Fox has strong incentives to approve its affiliates' retransmission consent agreements. Not surprisingly, therefore, Fox has never relied on its approval provision to reject an affiliate's retransmission consent deal.

[24] *TWC Comments*, at 5.

[25] *See* Declaration of Jon Hookstratten.

[26] *See id* Likewise, Fox has never attempted to commandeer Sinclair's negotiations with Mediacom or to obstruct Sinclair's ability to reach an agreement with Mediacom. *See id.*

[27] The Commission easily can dismiss TWC's allegation that Fox is "seeking to exploit the placement of broadcast signals on the basic tier by" seeking compensation from "cable subscribers whether they want to view the broadcast programming or not." *TWC Comments*, at 10. First, as described above, Fox's programming is among the most popular on TWC's systems. Second, and more importantly, if TWC does not feel that its subscribers want to view Fox programming, it could simply choose not to carry stations affiliated with Fox that have elected retransmission consent. The approval provision in the Fox network-affiliation agreement about which TWC complains applies only to stations that have elected retransmission consent.

relationship."[28] Because TWC presents the Commission with no basis for intervention in private business matters between sophisticated parties in a competitive marketplace, the FCC should dismiss TWC's claims relating to the retransmission consent rules.

B. TWC, Which Benefits Tremendously From Broadcast Stations' Investments in Compelling Content, Should Not Be Permitted to Use the FCC to Gain Leverage to Avoid Negotiating for Fair Retransmission Consent Compensation

Wholly apart from their lack of legal foundation, the retransmission consent allegations contained in the *TWC Comments* also provide no basis for Commission intervention as a matter of public policy.

TWC, like all MVPDs, reaps tremendous benefits by carrying broadcast stations on its cable systems, especially stations affiliated with a network such as Fox. Fox invests enormous resources, and takes immense financial risks, to provide its affiliated stations with high quality entertainment and sports programming. TWC obviously ascribes great value to this network programming, or else it simply would choose not to carry stations affiliated with Fox that elect retransmission consent. Of course, TWC values this network programming precisely because its own subscribers want access via the TWC cable line-up to some of the most popular programming on television, whether NFL football games, the popular new hit *Glee*, or the most watched program on television, *American Idol*.

Notwithstanding the popularity of this programming, TWC apparently does not believe that it should be obligated to provide broadcasters with fair compensation. As a result, it seeks to have the Commission intervene to protect it against having to engage in free and fair negotiations with broadcasters. No matter how hard TWC tries to wrap itself in the mantle of

[28] *Good Faith Order*, 20 FCC Rcd at 10354.

consumer welfare, however, its concerns are plainly driven by economics. At base, TWC does not want to share its profits with the broadcast stations whose programming invariably remains the most popular content that TWC carries.[29]

Even worse, TWC is now attacking not only its broadcast station partners, such as Sinclair, but also Fox for exercising its legitimate right to seek its own fair compensation for the valuable network programming that it creates and distributes. To be clear, Fox, in its role as a network, is *not* seeking anything directly from TWC. Rather, it has negotiated a provision in its private business contracts with its affiliates that permits Fox to employ an approval right before an affiliate grants an MVPD the right to retransmit Fox programming. Although not noted in the *TWC Comments*, the approval provision in Fox's affiliation contract has been in place for at least 14 years;[30] Fox has not, as TWC would have the Commission believe, recently introduced some new measure to alter the retransmission consent landscape.

TWC is right about one thing – Fox historically has found it challenging to garner any economic benefit from its approval provision. But that is because TWC, like nearly all cable operators, historically refused to pay cash to broadcasters in exchange for retransmission consent, making it difficult for Fox and other networks to share in their affiliates' retransmission compensation. TWC's decision to attack Fox in these proceedings is occurring now only because of the increased competition in the video programming marketplace. Whereas in 1993 a monopoly cable system typically was the only MVPD in a particular market, today a broadcast station can negotiate retransmission consent with several competing MVPDs, including Direct

[29] Even amidst the economic recession, TWC reported that its third quarter 2009 revenues increased 4% to $4.5 billion. It also reported a 4% rise in adjusted operating income, to $1.6 billion. *See Time Warner Cable Reports 2009 Third-Quarter Results*, Press Release (dated Nov. 5, 2009).

[30] *See* Declaration of Jon Hookstratten, Executive Vice President, Network Distribution, Fox Broadcasting Company, attached hereto as Exhibit A.

Broadcast Satellite providers (*e.g.*, Echostar and DirecTV), cable over-builders and telephone company video providers (*e.g.*, Verizon Fios and AT&T U-verse). Incumbent cable operators, such as TWC, are therefore for the first time facing increased pressure to pay cash compensation as they lose their monopoly power and the resulting leverage against broadcast stations in carriage negotiations. But it is the economic tension resulting from a more competitive video programming marketplace – not any undue pressure by stations or the networks – that has forced TWC to bargain on more fair terms and conditions.

To the extent that a broadcast station affiliated with Fox receives cash from an MVPD in exchange for retransmission consent, it is perfectly reasonable that Fox would want to share in that compensation, given that it is Fox's network programming that indisputably provides a substantial amount of the value for any retransmission consent compensation.

If anything, it is essential to the public interest for networks, like all participants in the broadcast business model, to seek a second stream of revenue. Broadcasting traditionally has been a medium supported solely by advertising, while cable networks receive revenue from both advertising and per-subscriber license fees. Congress and the Commission continue to believe that broadcasting plays an essential, *local* role in the media landscape. But if free, over-the-air television is to remain the home of compelling programming, be it the Super Bowl, the World Series or expensive scripted content, broadcasters, and networks especially, must develop a second revenue stream to remain competitive. Fox's attempt to develop this second revenue stream – for itself, its owned stations and its affiliated stations – is part of a shift in the economics of the television industry that is vital if free, over-the-air television is to survive and thrive in the 21st century. Thus, Fox is taking the reasonable position that stations that want to affiliate with Fox, and thereby benefit from its iconic brand and popular programming, participate in this effort to preserve the viability of broadcasting.

At the end of the day, however, this conversation is taking place between Fox and its affiliates, and Fox's relationship with its affiliates is nothing of TWC's concern. The cable operator should not be heard to complain to the Commission just because, as the result bargaining in a competitive marketplace, it might have to share some of its profits with broadcasters, the producers of the most popular content carried by TWC. The Commission should be especially wary of intervening to protect TWC when tilting the scales in favor of one side could imperil over-the-air broadcasting. Just as important, TWC should not be using complaint proceedings involving two other parties – Sinclair and Mediacom – to attempt to manipulate the retransmission consent process in favor of TWC's private pecuniary interest.

III. FOX'S NEGOTIATIONS WITH ITS AFFILIATES DO NOT RESULT IN A TRANSFER OF CONTROL

Equally unavailing, and unsupported by applicable law, is TWC's claim that the Fox network-affiliation agreement creates an unauthorized transfer of control of the affiliate station under Section 310(d) of the Act.[31] In examining control of a broadcast license, the Commission looks to whether an entity has obtained the power to dominate the management of the corporate affairs of the licensee or the right to determine the manner or means of operating the licensee or the policies that the licensee will pursue.[32] The principal indicia that the Commission examines to determine whether an unauthorized transfer of control has occurred are the basic operating policies of the station: the ability to control decisions concerning the

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[31] *See TWC Comments*, at 11.

[32] *See WHDH, Inc.*, 17 FCC 2d 856, 861 (1969) (*aff'd sub nom Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970) (*cert. denied*, 403 U.S. 923 (1971)).

personnel, programming, or finances.[33] The Commission does not focus on who executes these responsibilities, but rather on who establishes the over-arching policies governing these three areas.[34] TWC alleges that Fox has taken control over its affiliates' programming and economic rights,[35] but TWC ultimately fails to explain how a network's right to approve an affiliate's retransmission consent agreement usurps either of these central functions.

A. Like All Fox Affiliates, Sinclair Has Always Retained Control Over Its Stations' Programming Decisions

In evaluating the control of programming policy, the Commission examines whether a licensee retains the affirmative obligation to actively decide which content to broadcast on its station and to acquire programming toward that end.[36] The FCC also looks to ensure that a licensee has the ability to air issues of importance to its station's local community; broadcast educational and informational programming for children; reject or refuse portions of programming that the licensee believes to be contrary to the public interest; and interrupt any other programming for that which, in the licensee's determination, is of greater local or national public importance.[37] The relevant provision in Fox's network-affiliation agreement quite clearly fails to touch on any of these key issues.

Under Section 310(d) of the Act, a determination regarding programming control necessarily must involve the ultimate control over which programming is broadcast by a station. Nothing about this analysis implicates the retransmission consent process. A network's

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33 *See Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981).

34 *See Paramount Stations Group of Kerrville, Inc.*, 12 FCC Rcd 6135, 6145 (1997).

35 *See TWC Comments*, at 12-13.

36 *See Shareholders of the Ackerley Group, Inc.*, 17 FCC Rcd 10828, 10841 (2002).

37 *See Paramount Stations*, 12 FCC Rcd at 6145.

legitimate restriction on a station's authority to consent to the retransmission of the network's programs has no bearing on whether the licensee retains control over the selection of programming to be broadcast on its station.[38] In exercising its power to control programming, Sinclair, as with any network television affiliate, had the freedom to choose to operate its stations as independent outlets or to affiliate the stations with a network, thereby obtaining the right to air a slate of popular programming distributed by the network (subject to Sinclair's preemption rights).[39] In contrast, Sinclair's business decision regarding the distribution of its stations' signals has nothing to do with the content broadcast by those stations and is not an indicator of programming control.

TWC fares no better when it attempts to misdirect the Commission by citing one of the FCC orders implementing Section 325 of the Act for the premise that retransmission consent is subject to the control of the station licensee.[40] TWC neglects to mention that in the same paragraph, the Commission restated its determination, first set forth in the *1993 Order*, that a broadcast station's retransmission consent "may be freely bargained away in future programming contracts."[41] Because a network affiliation agreement is, at heart, a programming contract, the Commission already has blessed the concept that an affiliate can freely bargain

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[38] Each of the cases cited as examples of programming control in the *TWC Comments* deals with the selection of content to be broadcast (*see TWC Comments*, at 12, n. 37, *Midland Educational Broadcasting Foundation*, 4 FCC Rcd 5207, 5208 (1989); *Cosmopolitan Broadcasting Corp.*, 59 FCC 2d 558, 561 (1976); at 12, n. 38, *Cumulus Licensing, LLC*, 21 FCC Rcd 2998, 3005 (2006); at 12 n. 39, *WGPR, Inc.*, 10 FCC Rcd 8140 (1995)). TWC was unable to cite any case where the Commission found that retransmission consent relates to a licensee's programming discretion.

[39] *See, e.g.,* Paragraph 11 of the Fox Broadcasting Company Station Affiliation Agreement, attached as Exhibit A to the *TWC Comments*.

[40] *See TWC Comments*, at 12 (*citing Retransmission MO&O*, 9 FCC Rcd at 6746).

[41] *Retransmission MO&O*, 9 FCC Rcd at 6746; *see also 1993 Order*, 8 FCC Rcd at 3005 ("We interpret Section 325 as meaning that the new right [to retransmission consent] may be bargained away by broadcasters in future contracts and conceivably could have been bargained away in some existing contracts.").

away its retransmission consent rights in an affiliation agreement. For the same reasons noted above, since an affiliate lawfully can enter into a contract to abdicate total authority with regard to retransmission of its signal, it cannot result in a transfer of control for an affiliate to provide Fox with a limited approval provision as set forth in Fox's network-affiliation agreement.[42]

TWC is simply wrong to claim that Sinclair completely relinquished control over the retransmission consent process.[43]

B. Retransmission Consent Provisions in Network-Affiliation Agreements Do Not Strip Broadcast Licensees of Economic Control Over Their Stations

Although retransmission consent decisions can have economic consequences, they are not the kind of central business decisions that inform a determination about the ultimate control of a station. For this determination, the Commission examines whether a licensee retains discretion to pay station bills, hire or fire personnel, and upgrade or repair a station's facilities,[44] as well as whether the licensee has the right to receive advertising and other revenues.[45] The Commission also has inquired as to whether licensees maintain their own bank accounts, pay the salaries of their own employees and remain responsible for their own obligations to program suppliers and other third parties.[46]

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42 Furthermore, the primary decision regarding the carriage of a station's signal by an MVPD is the election of must-carry or retransmission consent status. Fox's affiliation agreement does not affect this fundamental choice, which is entirely up to the affiliate. Only after a station has elected retransmission consent does Fox's affiliation agreement require the station to seek the network's approval of the carriage terms. As described above, in the case of the Sinclair/TWC agreement, Fox played no role in negotiating with TWC for Sinclair's retransmission consent; it only reviewed (and approved) the terms reached by the licensee *See supra*, note 26.

43 *See TWC Comments*, at 11.

44 *See, e.g.*, *Radio Management Services, Receiver*, 7 FCC Rcd 2959, 2964 (1992).

45 *See Shareholders of the Ackerley Group*, 17 FCC Rcd at 10841.

46 *See WGPR*, 10 FCC Rcd at 8145.

A network's right to approve a retransmission consent agreement has nothing to do with these economic rights. To suggest, as TWC does,[47] that Fox's approval provision triggers a transfer of economic control is to allege that the entire network-affiliation business model violates Section 310(d) of the Act. The Commission should not countenance such unsupported claims about the fundamentals of the television business, especially when the charge has been levied in furtherance of TWC's private economic interests. In any case, there is simply nothing improper or "brazen" about a network seeking to be fairly compensated for the value of the programming that it supplies to affiliates.[48]

The Commission also has made it clear that it will not interject itself into specific arguments concerning private agreements between broadcast stations, networks and cable operators.[49] TWC is actually complaining about the intersection of two private agreements: the retransmission consent agreement between itself and Sinclair and the network-affiliation agreement between Sinclair and Fox. The Commission should be doubly reluctant to place itself at the center of a private business dispute involving two agreements between three sophisticated businesses.

TWC makes equally specious allegations that the approval provision in Fox's affiliation contract violates the Commission's policies regarding network-affiliate relationships.[50]

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47 *See TWC Comments*, at 12-13.

48 As described above, broadcast networks, together with other broadcasters, are seeking compensation in order to remain competitive in the video programming marketplace. Cable networks rely on a business model in which MVPDs pay cash to the programmer, while the MVPD and the programmer share advertising availabilities. By seeking cash compensation in exchange for retransmission consent, broadcast stations and networks are merely moving toward the model that TWC and other MVPDs long ago adopted for all their non-broadcast program channels.

49 *See Monroe*, 19 FCC Rcd at 13981.

50 *See TWC Comments*, at 14-15.

The cable company speculates (again, without support) that the provision influences the rates for the sale of an affiliate's non-network advertising time; TWC also claims that the clause somehow transforms the network-affiliate relationship into an agreement for the representation of the affiliate in the sale of advertising time.[51] A retransmission consent agreement addresses the delivery of a station's signal to an MVPD's audience. It does not affect in any way the station's sale of advertising time or the advertising rates that a station sets independently of the network. To be clear, Fox plays no role whatsoever in the sale of non-network advertising time on independently-owned affiliated stations.[52]

C. Although Fox's Network-Affiliation Agreements Have Been Subject to Years of Scrutiny By the Commission, Its Approval Provision Has Never Been Cause for Concern

Importantly, the approval provision has been a part of the standard Fox network-affiliation agreement for at least 14 years.[53] Within that time, the Network Affiliated Stations Alliance ("NASA") filed a "Petition for Inquiry into Network Practices," seeking a full-fledged Commission investigation of a variety of provisions in network-affiliation agreements that NASA alleged violated FCC rules and policies.[54] The proceeding resulted in intensive inquiry and years of comments and *ex parte* pleadings before the Commission. The FCC ultimately

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[51] *See id.*

[52] *See* Declaration of Jon Hookstratten. Moreover, as noted above, Fox cannot, by rejecting an affiliate's retransmission consent agreement, preclude the transmission of an affiliate's "non-network local and syndicated programming." *TWC Comments*, at 15. Fox's contractual right relates only to the retransmission of Fox programming, not the affiliate's right to have other programs and its entire signal retransmitted on any MVPD system it chooses.

[53] *See* Declaration of Jon Hookstratten.

[54] *See In re Petition for Inquiry Into Network Practices*, Network Affiliated Stations Alliance, DA 01-1264 (filed March 8, 2001).

issued a "Declaratory Ruling" terminating the proceeding after it concluded its evaluation of network-affiliation agreements.[55]

Notwithstanding the close scrutiny given all network-affiliation contracts, including Fox's, the Fox approval provision was not once the subject of any affiliate complaint, let alone FCC concern, during the years-long NASA proceeding. TWC now finds fault with it, but TWC is not a party to any network-affiliation agreement and merely seeks to stir up controversy in an effort to gain an advantage in its own retransmission consent negotiations with broadcast stations commonly owned with Fox. TWC has not even come close to supporting a claim that Fox's network-affiliation agreement, or its relationship with its affiliates, constitutes a transfer of control.[56] Nor has TWC presented any justification for the Commission to intervene in the network-affiliate relationship, other than advancement of TWC's private economic interests.

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[55] *Network Affiliated Stations Alliance Petition for Inquiry into Network Practices and Motion for Declaratory Ruling*, 23 FCC Rcd 13610 (2008).

[56] As noted above, moreover, to the extent that the Commission was prepared to accept a scenario in which Fox literally assumed the right to negotiate retransmission consent *on behalf of* its affiliates, *see News/Hughes Order*, 19 FCC Rcd at 572, Fox's far less expansive approval provision cannot possibly be deemed a transfer of control.

For all of the reasons set forth herein, Fox respectfully requests that the Commission disregard the allegations against Fox set forth in the *TWC Comments*. The Commission's clear precedent demonstrates conclusively that Fox's network-affiliation agreement fully complies with the FCC's rules and policies, as well as the Act. Because TWC has raised no issues about Fox warranting further inquiry or concern, its comments should be dismissed.

Respectfully submitted,

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December 17 , 2009

EXHIBIT A

DECLARATION

I, Jon Hookstratten, hereby state as follows:

1. I am Executive Vice President, Network Distribution, Fox Broadcasting Company ("Fox"). I submit this Declaration in connection with Fox's *ex parte* comments filed in response to Time Warner Cable's ("TWC") comments as part of the Sinclair-Mediacom retransmission complaint proceeding pending at the Commission (CSR Nos. 8233-C and 8234-M).

2. For at least 14 years, Fox's standard network-affiliation agreement has included a provision requiring that broadcast stations affiliated with Fox obtain Fox's prior approval before granting a multichannel video programming distributor ("MVPD") consent to retransmit Fox's programming.

3. Specifically, Paragraph 17(a) (the "approval provision") of Fox's network-affiliation agreement with Sinclair Broadcast Group, Inc. ("Sinclair") provides, in relevant part:

> *Without Fox's prior written approval, Licensee shall not grant its consent to the transmission or retransmission, by any cable system, satellite, other multichannel video programming distributor ("MVPD"), telephone system, microwave carrier, wireless cable system or other technology wherever located, of Station's broadcast of any Fox programming.*

4. In exercising its rights pursuant to the approval provision, Fox has never stripped Sinclair of control over its right or ability to negotiate a retransmission consent agreement with TWC or any other MVPD. Fox has never impeded Sinclair's right or ability to conclude a retransmission consent agreement with TWC or any other MVPD. Fox has never demanded that Sinclair retain the right to terminate any retransmission consent agreement that it reaches with TWC or any other MVPD.

5. On or about July 30, 2009, Fox sent a letter to all of its affiliates, including Sinclair, to remind them of their contractual obligation to seek Fox's approval before granting an MVPD consent to the retransmission of Fox's network programming. Shortly thereafter, Sinclair informed Fox that it was in the process of negotiating a retransmission consent agreement with TWC for broadcast stations that included Fox affiliates. At that time, Sinclair sought Fox's approval to enter into a retransmission consent agreement with TWC.

6. Fox, pursuant to the approval provision, subsequently approved Sinclair's grant of its consent to the retransmission by TWC cable systems of Fox's network programming broadcast by Sinclair's stations.

7. Fox's network-affiliation agreements do not provide Fox with any right to, nor does Fox in practice, set, influence or control the advertising rates for any of its independently-owned affiliated stations' non-network broadcast time.

8. Fox's network-affiliation agreement does not provide Fox with any right to, nor does Fox in practice, represent any of its independently-owned affiliated stations in the sale of non-network time.

I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge, information and belief. Executed on December 16, 2009.

Jon Hookstratten
Executive Vice President, Network Distribution
Fox Broadcasting Company
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CERTIFICATE OF SERVICE

I, Tracey M. Combs, hereby certify that copies of the foregoing filing were served this 17th day of December 2009, via first-class mail, postage pre-paid, upon the following:

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